

**Restorative Justice: A Marxist Analysis**

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**Thesis Presented for the Degree of  
DOCTOR OF PHILOSOPHY  
in the Institute of Criminology  
Faculty of Law  
UNIVERSITY OF CAPE TOWN**

**August 2005**

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## **ABSTRACT**

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### Abstract

Restorative justice is the *enfant terrible* of the criminological world. In no time, it has rocked the edifice of the criminal justice system, challenging the latter's very existence. It has inculcated the retributive focus of criminal justice in the creation and reproduction of the contemporary crisis of criminality. It has proclaimed itself to be in possession of the solution to that crisis. And it has offered itself as the path to a higher plane of human existence characterized by respect, trust, mutuality, and the like.

The restorationist answer to the crisis of criminality is a radical one. Taking their theoretical lead from Nils Christie, the adherents of restorative justice propose the privatization of the criminal episode. That is, they contend that crime should be removed from the public arena and reconstituted as a private conflict in which victim, offender and community all have an interest as 'stakeholders'. The crime should be comprehended as the property of these 'stakeholders' who may dispose of it according to terms and conditions which they negotiate *inter se*, without reference to a public authority. The proponents of restorative justice believe that this was humankind's aboriginal response to criminal conflict and that it succeeded in a way that statist criminal justice never has. They therefore advocate that we should take our adjudicative cue from our ancestors, and revert to our restorative instincts.

Two versions of restorative justice may be identified. Firstly, there is a comprehensive version which proposes the abolition of the criminal justice system as a public institution. In other words, it anticipates the complete



separation of criminal justice and the state. All criminal conduct is to be resolved privately, according to the designs of the triad of 'stakeholders'. Secondly, there is a partial version which proposes a sphere of privatized justice within the public system. In other words, the state surrenders designated criminal conflicts for private resolution, but remains in overall command of the criminal justice system. Although it devotes some attention to partial restorative justice, this dissertation is concerned primarily with the analysis of comprehensive restorative justice.

The approach adopted is a critical one, informed by the tenets of Marxism. That is, the dissertation is a Marxist critique of comprehensive restorative justice. It deploys the analytical resources of Marxism in an attempt to excavate the ontological presuppositions of restorative justice and to confront its core principles. The hope is that the Marxist method will lay bare the hidden constitution of restorative justice, which constitution is routinely obscured by its form.

The analysis is located at two levels of abstraction. At the lower level, it follows the traditional Marxist endeavour to uncover the class content of restorative justice. Here the operational principles of restorative justice are subjected to Marxist class analysis. At the higher level, the analysis seeks to comprehend restorative justice as a legal form. Here the argument relies upon the non-traditional general theory of law elaborated by Evgeny Pashukanis. The general theory posits that the analysis of the legal form should proceed in terms of its relation to the commodity form. The critique of restorative justice presented here seeks to interrogate it as a legal form of late capitalism. This is the postmodern epoch of capitalism, marked by 'the commodification of everything'. In other words, it is an epoch in which the commodity form enjoys absolute supremacy. Pashukanis's general theory of law is used to analyse restorative justice as a legal form which commodifies criminality.

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## INTRODUCTION

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## Introduction

Restorative justice is easily and indisputably the most exciting and fascinating recent development in the criminological field. As a self-consciously new way of doing justice, it is no more than twenty-five years old. Yet, it has captured the imagination and won the approval of large numbers of criminal justice analysts and practitioners who see in restorative justice a practicable and promising solution to the international crisis of criminality. One discerns a collective sense of relief - and belief - that finally, after so many false starts and blind alleys, there is a real possibility that the answer to one of the most intractable problems of contemporary society has been discovered. Indeed, if the proponents of the restorative justice are to be believed, their project may hold the key to solving all the serious socio-economic problems of our time. Certainly, restorative justice has rapidly acquired an imposing presence in and dramatic influence upon the world of criminal justice, and demands to be taken seriously.

The popularity of restorative justice is evident from the large number of officially-sanctioned restorative justice programmes operating in a large number of countries.<sup>1</sup> All over the world, restorative justice has become the rallying cry of organizations and institutions which see in its principles and practices a way of transcending the limitations of criminal justice. The banner of restorative justice flies high in the troubled atmospheres of very many criminal jurisdictions. It is no longer possible to participate in, or even to comment upon, matters criminological without some sort of engagement with restorative justice and its implications. The criminological community is abuzz with the clamour and challenge of this new way of doing justice. Whether we like it or not, this is the era of restorative justice. Its

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<sup>1</sup> See Batley & Dodd (2005) for a recent survey of the international development of restorative justice. See also Ashworth (2003: 165-168).

advocates never tire of reminding us of the impotence of the criminal justice system in the face of the crisis of criminality. And they are strident in their conviction that the answer to the crisis lies in the restorationist way.

The growth of restorative justice has been no more apparent than in the multitude of books, articles, reviews and reports which have been written to explain or analyse or justify virtually every aspect of the restorationist project. There has, in the last decade, been a dramatic explosion of advocacy literature. Publications have mushroomed to the point where it is no longer possible for one person to keep abreast of the literature. This literary boom has been productive, in the sense that the fundamental principles of restorative justice have been progressively clarified over time. Whereas a decade ago there was still some uncertainty about the parameters and principles of restorative justice, today there is fairly widespread agreement about what restorative justice is and how it is supposed to be achieved. Whatever disagreements persist within the restorationist camp nowadays tend to concern issues of ambit and implementation rather than of principle. The field is thus a fairly unified one, certainly amongst those who would consider themselves to be restorationists.<sup>2</sup>

One of the consequences of this restorationist accord has been a conspicuous dearth of critique. Despite the near surfeit of literature on restorative justice, very little of it is properly critical.<sup>3</sup> Advocates outnumber critics manifold. Most of the literature tends to be either expository or exhortatory. It focuses either upon

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2 See Batley (2005), Marshall (2003) and Zehr & Mika (1998) for useful statements of the major principles of restorative justice.

3 Thus, for example, the seventeen-article collection edited by McLaughlin *et al* (2003) while purporting to focus upon critical issues in restorative justice, contains only one article (by Ashworth) which may be classified readily as properly critical. Similarly, the collection of thirty-one 'critical' articles edited by Zehr & Toews (2004: vii) is authored, according to the editors, entirely by 'long-term advocates and practitioners of restorative justice'.

explicating the principles of restorative justice or upon assessing the success or otherwise of restorative justice projects. The bulk of whatever criticism of restorative justice is contained in the literature tends to be of the 'friendly' or reflexive sort, in the sense that the critics are themselves committed to the success of the restorationist project and are concerned about the negative impact which restorationist excesses may have upon that success.<sup>4</sup> Restorative justice gets very little bad press. Commentators generally do not engage the precepts and presuppositions of restorative justice in any deep and sustained critical sense. And a strong voice of disapproval is immediately noticeable for its infrequency. The critical endeavours of analysts such as Acorn, Ashworth, Delgado, Levrant *et al*, Takagi & Shank, Varona and Von Hirsch stand out precisely because they tend to be rarities.<sup>5</sup> This dissertation stands with the critics, albeit from a position which is very different from existing restorative justice criticism.

At this point, it is as well to delineate the object of the analysis undertaken here. There are two versions of restorative justice, which I shall designate comprehensive and partial.<sup>6</sup> Comprehensive restorative justice is systemic, in the sense that it considers itself to be a comprehensive alternative to the criminal justice system. The restorative process would be applicable to all crimes and offenders, and the restorative sanction would replace all state punishments. Whereas criminal justice is statist, comprehensive restorative justice envisages a dispensation which is wholly privatized. It is, in this regard, anti-statist. Partial restorative justice, by contrast, is not systemic. It does not present itself as a substitute for the extant

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4 See, for example, Daly (2003) and Van Ness (1993).

5 See Acorn (2004), Ashworth (2003a & 2003b), Delgado (2000), Levrant *et al* (1999), Takagi & Shank (2004), Varona (1996) and Von Hirsch & Ashworth (1992 & 1993).

6 See Tshehla (2004: 7) who states that 'there are two main approaches to restorative justice', the first seeing it 'as an alternative system to the conventional one', the second as 'a complement to the criminal justice system'.

system. It is content to be an adjunct to the system. This rendition of restorative justice typically is restricted in application to certain crimes or certain offenders, and proffers the restorative sanction in place of state punishment for these cases only. Partial restorative justice is not anti-statist. It accepts the role of the state in the existing system. However, it does want a designated non-statist sphere, parallel to the existing system, in which sphere justice is privatized. Comprehensive and partial restorative justice coincide in the sense that both require their respective areas of operation to be free of state control. However, the former is radical in its anti-statism, while the latter is conservatively reliant upon the consent of the state. The former is abolitionist, the latter accommodationist.

The object of analysis of this dissertation is comprehensive restorative justice. Any analytical attention which is devoted to partial restorative justice is incidental to this focus. One suspects that a large number of restorationists are adherents of the partial version.<sup>7</sup> However, this version of restorative justice holds little philosophical attraction and is of minimal theoretical consequence. It is little more than a pragmatic adaptation to the contradiction between criminal justice and comprehensive restorative justice. Like every *via media*, it attempts to have the best of both worlds. However, in this case the conflict between those two worlds is fundamental. Comprehensive restorative justice is the negation of criminal justice, and *vice versa*. Comprehensive restorative justice is engaging analytically precisely because it entails a radical rejection of what is. Partial restorative justice is not, precisely because it seeks a *modus vivendi* with what is. It therefore does not demand

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7 Thus, for example, Batley & Maepa (2005: 19) declare that to support restorative justice 'is not to suggest an overhaul of the entire system'. For them, restorative justice 'should complement rather than replace the current retributive justice system'. See also Tshehla op cit 15 and Van Ness op cit 261-264.

sustained analytical attention.<sup>8</sup> In any event, it makes sense only in its relation of incompleteness to comprehensive restorative justice.<sup>9</sup> In the remainder of this dissertation, then, any unqualified reference to restorative justice means comprehensive restorative justice. References to partial restorative justice will be identified explicitly as such.

Comprehensive restorative justice summates in the abolitionist proposition to dismantle the criminal justice system and, thereby, to evict the state from its current position as organizational axis of society's response to crime. Restorative justice is thus about the privatization of criminal justice. In this new world of privatized justice, crimes cease to be incursions against the public authority of the state and are, instead, re-conceptualized as private disputes between the affected parties, to wit, the offender, the victim and the community. Indeed, according to the leading theorist of restorative justice, a crime is the property of those most directly affected by it and, *qua* property, may be disposed of according to what its owners consider to be appropriate to the circumstances.<sup>10</sup> Restorative justice is thus infused with the proprietary ethos. It theorizes proprietorship as the key to the resolution of the crisis of criminality. It bears repeating that this stance, in its total departure from the protocols of criminal justice, is a radical one.

Unlike all its predecessors, restorative justice approaches the crisis of criminality, which has virtually every Western capitalist country in its grip, in terms of contrivances which fall completely outside the parameters of criminal justice as

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8 For the most part, the analysis of partial restorative justice is entailed in the analysis of comprehensive restorative justice.

9 Of course, partial restorative justice cannot be dismissed summarily, since it is the version of restorative justice which has been implemented in programmes all over the world. The theory of partial restorative justice is engaged in some detail in Chapter Four below.

10 See Christie (1977).

we know it. Indeed, it rejects all the suppositions of modern criminal justice and proposes a strategy which deviates fundamentally from the conventional criminal justice design. Restorative justice signals a paradigm shift, from the modern to the postmodern. Criminal justice operates within the parameters of the modern response to criminality. It proceeds from the metanarrative of the state as the guarantor of public order. It establishes standardized criteria for dealing with all forms of criminal conduct as offences against the state. And it imposes like punishments for like offences. Restorative justice, by contrast, is the prototypical postmodern answer to the international crisis of criminality. The modern metanarrative is rejected as unreliable and *passé*, and replaced with an outsider jurisprudence organized around the postmodern narratives of the multitude. Public criminal justice yields to privatized restorative justice, and justice itself becomes a matter of negotiation, according to the exigencies of each individual restorative encounter.<sup>11</sup>

What is more, the aspirations of restorative justice go well beyond the problem of criminality. Most restorationists, both comprehensive and partial, do not consider their project to be an exclusively crime-fighting endeavour. They anticipate that it has the capacity and resilience to tackle and perhaps even eradicate the causes of the crisis of criminality. In other words, restorative justice aims to be more than a successful response to crime. Transformation is integral to its agenda. The restorative process is intended to be a source of existential change for those involved. The successful restorative encounter is supposed to be the gateway to a higher level of human interaction. The following statement by Braithwaite is representative:

‘Restorative justice, conceived as an intellectual tradition or as an approach to political practice, involves radical transformation. On this radical view restorative justice is not simply a way of reforming the criminal justice system, it is a way of transforming the entire legal

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<sup>11</sup> The postmodern aspect of restorative justice is analysed fully in Chapter Six below.

system, our family lives, our conduct in the workplace, our practice of politics. Its vision is of an holistic change in the way we do justice in the world.’<sup>12</sup>

Toews & Zehr, too, have a quite euphoric vision of the promise of restorative justice:

‘The restorative process itself embodies other benefits that carry a powerful message and challenge our understanding of the social world. The process empowers those who are typically silenced in the justice process. It indicates that people can solve their own problems if given the means to do so. It promotes the importance of dialogue. It builds community and relationships among people who are typically seen as enemies.

Perhaps most importantly ... restorative justice processes contribute to the breakdown of othering and social distance. Victims, offenders, and those involved in facilitating these processes begin to see beyond stereotypes and generalizations that they have about the people involved in the crime event. They see victims as people deeply wounded by an event and hear the personal impact of the crime upon their lives. They hear the individually unique perspective of offenders and their ideas for justice. Through the dialogue they are no longer in categories of “us” and “them” but rather in the category of “we”, shaped by their mutually created meaning of the crime event.’<sup>13</sup>

The radicality of restorative justice is extensive enough to include a self-image as general social panacea. A new way of doing justice portends a new way of living in the world.

Restorative justice thus postulates a solution to the crisis of criminality which breaks decisively with all that has gone before. The claims of restorative justice are capacious, and its operational techniques are very different from what we know and have long accepted as more or less indispensable. Indeed, the restorationist project trashes criminal justice as we know it, and seeks to remove it to the archive of

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12 Braithwaite (2003c: 1).

13 Toews & Zehr (2003: 265-266). See also Braithwaite (2003a and 2003b). See further Acorn (2004: 2) who states that restorative justice envisions ‘justice as the repair of the world’. Christie (op cit) too thinks of restorative justice in such large and catholiconic terms.

criminological disasters. The confrontation between restorative justice and criminal justice is, in this sense, rudimentary. There is, therefore, every reason why restorative justice should be the subject of systematic and sustained critical engagement. A project which aims to create a new world by destroying the old ought to be taken seriously. It is difficult to comprehend why there has been so little effort to analyse restorative justice critically.

The practice of critique is, by definition, an exercise in fault-finding. But it is also a method of analysis. It is a mode of scrutinizing the epistemological postulates and of excavating the ontological presuppositions of the object of analysis. The critique of restorative justice must go to its compositional elements and must comprehend its quotidian concerns in relation to these elements. Critique needs to uncover the set of presumptions about social existence which underlies the restorationist project. It needs to avoid the lure of the restorationist self-image and lay bare its hidden constitution. The form of restorative justice is not an accurate or complete expression of its content. A primary purpose of critique is to interrogate this dichotomy between form and content. Such interrogation must aspire to the dual goal of both illuminating the content concealed by the form and of explaining why the content has 'chosen' the given form.

This dissertation is a critique of restorative justice. The critical enterprise undertaken here traverses four facets of the restorationist project. Firstly, it examines the crucial historical claim that restorative justice is the primeval form of human justice; secondly, it evaluates the key principles which comprise the operational directives of restorative justice; thirdly, it scrutinizes the theory of restorative justice; and finally it investigates restorative justice as a species of postmodernism. As a whole, the dissertation is conceived as a contribution to the development of a sustained critical engagement with the factors constituting restorative justice, which



engagement is signally underdeveloped in the current literature on the subject. It is an extended and polemical exercise in confronting restorative justice at its basis, that is, at the level of its foundational propositions. It is an exercise which is both necessary and overdue. The advocacy literature is dominated by highfalutin hagiography. It is high time that sober critique, from without the ranks of its advocates, becomes more regular and prominent.

The analysis presented in the chapters which follow proceeds from an openly and consciously partisan perspective, namely, the Marxist perspective. Hitherto, Marxists have not given serious attention to restorative justice. Indeed, I have not happened upon even one explicitly Marxist analysis of restorative justice. This apparent lack of interest is or ought to be surprising. For, restorative justice presents the kind of challenge to the criminal justice system that resonates with the radicality of the Marxist project. The idea of a response to crime which goes beyond the conventional notion of punishment should be, in the least, intriguing to the advocates of Marxism. The notion that the solution to the capitalist crisis of criminality lies in the relocation of crime to the realm of the private should be, if nothing else, fascinating from the Marxist perspective. Certainly, Marxism has much to say about restorative justice. The analytical resources of Marxism provide keenly incisive tools for the critique of restorative justice. The Marxist method provides insights into the constitution of restorative justice which are otherwise inaccessible. It is a perspective which facilitates the critique of restorative justice in a properly interrogative manner, as regards both ontology and epistemology. Indeed, it is arguable that the critique of restorative justice has remained relatively primitive and has not advanced beyond the rudimentary precisely because it has not yet enlisted the critical apparatus of Marxism.

This dissertation is thus an exercise in Marxist critique, that is, in taking restorative justice seriously as an object of systematic materialist analysis. It seeks to uncover and confront the elemental structure of restorative justice by subjecting it to the critical gaze of the Marxist analytic. The analysis presented is intended to operate at two levels of abstraction. The first and lower level is the traditional Marxist emphasis upon class analysis, in which an effort is made to make manifest the class content of juridical relations and legal arguments, and to introduce the idea of class struggle into their comprehension. This is the level at which the claims of restorative justice are subjected to the searching type of analysis which is informed by the Marxist concept of social class, and more specifically, the class relations which found the social relations of production of the capitalist mode of production.

The second and higher level of abstraction entails a focus upon the legal form as such, and upon its relation to the value or commodity form which constitutes the aboriginal unit of capitalist political economy. This is a more rarefied level of analysis, which is concerned to examine the extension of the operation of the laws which govern capitalist production and exchange to the superstructural incidents of the capitalist world. It is the level of analysis which is concerned to comprehend the legal form in its own right, not as a passive reflection of a given class content, but as a superstructural effectivity which needs and deserves analysis *qua* legal form. The idea of such analysis is not to detach the legal form from its material roots. Rather, the idea is to show how those material roots find juridical expression in the form they do. This level of analysis is concerned to demonstrate that restorative justice, as legal form, has deep roots in the material constitution of the capitalist mode of production.<sup>14</sup>

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14 The Marxist concept of abstraction is fleshed out further in Chapter One and in Chapter Five below.

Although located at different levels of abstraction, the two modes of analysis relied upon thus share this fundamental link, that they are both concerned to make explicit the material basis of the juridical moment of the social relations of production of capitalism. Also, both modes of analysis are informed by the canons of the Marxist method. Chapter One contains a concentrated exegesis of the fundamentals of this method. It is, of course, not possible to do justice to the complexities of the method of Marxism in a single chapter. Certainly, no claim can be made for the exposition in Chapter One being either definitive or comprehensive. The most that can be asserted is that the chapter sets out, in telescoped form, the essential signposts of the Marxist methodology. If the chapter imparts a working sense of the materialism, in its dialectical and historical aspects, which informs the epistemology of Marxism, then it has succeeded. It is hoped that the remainder of the dissertation will then succeed in its attempt to apply the Marxist method to the critique of restorative justice.

Chapter Two evaluates what is surely the most popular and generally accepted restorationist claim, namely, that the sources of restorative justice go back to the premodern juridical past of humankind. This is a claim which is readily asserted but which is far too seldom subjected to serious investigation. Yet it needs to be interrogated, for it is the basis of the considerable historical legitimacy which restorative justice enjoys. There is perhaps no more credible an argument for a project than that it is historically justifiable. The argument from history is powerful and decisive.<sup>15</sup> Who can take issue with a way of doing justice which has, by all accounts, worked very well in the past and which promises to do in the present what no other programme has been able to achieve? Who dares raise objections against a form of justice which is presented as primordial and even natural? The historical

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15 See Füredi (1992: 17-18).

directly to the development of production for exchange. In other words, Chapter Two offers historical insight into the constitution of restorative justice as an advanced juridical expression of generalized commodity production.

The fundamental operational claims or requirements of restorative justice are canvassed in Chapter Three. Five such claims<sup>16</sup> are identified and subjected to critical scrutiny in the chapter. The analysis undertaken is conventionally Marxist, in the sense that it assesses the claims of restorative justice in terms of the notions of class and class struggle. This is necessary, not least because the advocates of restorative justice appear to have little regard for the effect that these notions may have upon their project, its implementation and the kind of justice it ultimately delivers. The impact of social class is both extensive and deep, and very few criminal justice practitioners would nowadays attempt to deny or ignore the relationship between class and criminality. Yet restorationists routinely argue their case and promote their project as if the society in which we live or the community in which they operate is classless, at least in the sense that it is not rent by class conflict.

This obviously is unacceptable, even from a non-Marxist sociological perspective. The weight of social class is simply too great to bypass altogether and must be factored into any serious analysis of restorative justice. Chapter Three thus confronts the claims of restorative justice with the notions of class and class conflict. Its primary purpose is to challenge the apparent class-blindness of restorative justice. If restorative conferences are not to become yet another source and site of class domination, the importance of class needs to be accepted and the dangers of class-based restorative sanctions must be faced head-on. In this regard Chapter Three falls

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16 They are the restorative sanction, the restorative process, the empowerment of the victim, the reconstruction of the offender, and community participation.

squarely within the orthodox Marxist technique of foregrounding issues of class and class conflict in situations where these have apparently been overlooked.

Chapter Four and Chapter Five engage the theory of restorative justice directly. Like every other project, the restorationist one is grounded in theory, that is, a coherent set of propositions which gives shape to its practice. The principles according to which the restorative justice programme operates are derived from the corpus of theory underlying it. The task of these two chapters is to explicate and dissect the theoretical physiognomy of restorative justice. The critique of the theory of restorative justice is the core component of the critique of restorative justice. For, it is in the theory that is to be found the true justification of the principles and practice. It is the theoretical statutes which contain the key to the restorationist epistemology. Chapters Four and Five are, in this connection, the core chapters of the dissertation. They interrogate the theory of restorative justice theoretically, in an effort to unveil the essential constitution of restorative justice as legal form. They make accessible, via the Marxist critical method, the ontological hypotheses of the restorationist project.

At this juncture it must be noted that the proponents of restorative justice are not the most eager of theoreticians. In fact, there is a discernible tendency in restorationist ranks to eschew theory and focus upon the operational requirements of the restorative justice project. And there are, in the pantheon of restorationist works, but few of any genuine theoretical consequence. Three works stand out in this regard as properly theoretical. They are Christie's *Conflicts as Property*, Braithwaite & Pettit's *Not Just Deserts*, and Cragg's *The Practice of Punishment*. This trilogy is

deeply and scrupulously theoretical. Christie's 15-page piece is the undisputed theoretical progenitor of restorative justice. And Braithwaite is the most prominent and prolific of the advocates of restorative justice.<sup>17</sup> In a field marked by atheoreticism, their contributions thus demand serious consideration.<sup>18</sup> Christie and Braithwaite & Pettit theorize comprehensive restorative justice, while Cragg theorizes partial restorative justice. Chapter Four is devoted to the exposition and critique, from the Marxist perspective, of the theories of restorative justice constructed by Christie, Braithwaite & Pettit, and Cragg.

Chapter Five is the theoretical heart of the dissertation. It is concerned to apply to the analysis of restorative justice the general theory of law elaborated by the Bolshevik jurist, Evgeny Pashukanis. It is a theory which is steeped in the tradition of classical Marxism and which established the critique of the legal form on a firm materialist footing. Pashukanis took the Marxist analysis of legal relations beyond the conventional attempts to uncover their class nature. Instead, he identified the legal form itself as a valid object of Marxist analysis, and sought to explain it materialistically in relation to the cell-form of capitalist production, the commodity. That is, Pashukanis comprehended the legal form as the homologue of the commodity form. It is the commodity form juridified. There is, in other words, a constitutional correspondence between legal and commodity relations. The central argument of Chapter Five is that Pashukanis's general theory of law is pivotal to the Marxist critique of the theory of restorative justice.

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<sup>17</sup> See Acorn (2004: 30).

<sup>18</sup> Interestingly, although neither *Conflicts as Property* nor *Not Just Deserts* is expressly concerned with the principles of restorative justice, both theorize restorative justice with considerable sophistication. It would appear that the authors of both works accepted that the theory of restorative justice could not be derived from the practice of restorative justice. Hence their disregard for the operational tenets of restorative justice.

In theoretical terms, restorative justice is fundamentally about the extension to the legal form of the principle of equivalence which governs the commodity form. The ideas of class and class conflict do not feature here. In the world of the commodity, every person is a proprietor, regardless of the actual class position which the person occupies and of the kind of property owned.<sup>19</sup> The world of the commodity is a world structured by the principle of equivalence, a principle which denies qualitative difference and which treats every commodity owner as the equal of every other commodity owner. According to Pashukanis, the self-same principle of equivalence which defines the commodity form also governs the legal form. Chapter Five seeks to comprehend restorative justice as a Pashukanian legal form. That is, it seeks to make sense of the theory of restorative justice in terms of the principle of equivalence expressed in the fundamental juridical categories. To this end, the chapter commences with a fairly extended exposition and defence of Pashukanis's general theory of law and ends with an interrogation of the basic theoretical claims of restorative justice in relation to the elements of the general theory.

Chapter Six, the final chapter, submits that restorative justice is the criminal justice of postmodernism. The postmodern project is the product of the contradictions of late capitalism. It attributes the contemporary social crisis to the failure of the metanarrative of modernism, and aspires to replace it with the relativism and instability of a congeries of narratives. Essentially, restorative justice is the juridical conjugate of postmodernism. Its genesis lies in the same matrix of material conditions which gave life to postmodernism, and its principles echo the basic arguments of the postmodern project. Postmodernism is radical in its assault upon modernism, and restorative justice is radical in its rejection of the criminal

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19 The nature of the property owned or controlled is directly dependent upon the proprietor's class position. The capitalist is constituted by ownership of the means of production, the worker by ownership of his own labour-power.

justice system produced by modernism. Chapter Six, then, is concerned to comprehend the relationship between the postmodern and restorationist projects in Marxist terms. To this end, Pashukanis's general theory is again deployed in the critique of restorative justice as a postmodern jurisprudence. It is argued that both postmodernism and restorative justice remain devotees of that most basic law of capitalist political economy, the principle of equivalence.

Earlier it was noted that the analysis contained in the dissertation is intended to operate at two levels of abstraction. It remains now to record how these two modes of analysis or levels of abstraction relate to the composition of the individual chapters, specifically Chapters Two to Six.<sup>20</sup> Chapters Three and Four are located almost entirely at the first level of abstraction. In other words, they employ a mode of analysis which endeavours to expose the ideological impulses and class imperatives of restorative justice. In this connection, they fall squarely within the traditional Marxist approach to the analysis of legal relations. Chapter Five, by contrast, is located almost entirely at the second, higher level of abstraction. It relies upon a mode of analysis which seeks to uncover the deep structure of restorative justice as legal form, regulated by the principle of equivalence. The aim is to demonstrate the connections between the fundamental categories of political economy and the fundamental categories of juridical life. It is this relationship which informs the analysis of restorative justice undertaken in the chapter.

Chapters Two and Six are different in that they invoke both modes of analysis and move from one level of abstraction to the other. They commence at the lower level of abstraction with a focus upon class and class conflict and then progress to the higher level and a consideration of the fundamental concepts of the juridical moment.

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20 Chapter One is methodological and falls naturally without these modes of analysis.



Thus, Chapter Two examines both the class content of the notion of composition upon which the historical claims of restorative justice rest, and it seeks to uncover the historical link between the concept and the value relation in the process of commodification. Chapter Six, similarly, seeks to expose the class nature of the postmodern project while simultaneously demonstrating that, like its restorationist counterpart, the postmodern moment obeys the basic laws of the commodity economy, including the law of value as expressed in the principle of equivalence.

All in all, the dissertation strives to elucidate the strengths and the weaknesses of restorative justice as a self-proclaimed solution to the international crisis of criminality. It is Marxist and, hence, systematically critical. It is concerned to engage restorative justice in a manner that facilitates comprehension of its class content and of its character as legal form. This concern is fully justified by the patent insufficiency of analyses of the restorationist project which are properly critical and the even starker dearth of analyses which are Marxist. This dissertation has thus been written from the dual conviction that critique is the cornerstone of comprehension, and that the Marxist method is the most potent instrument of critique. It would be heartening if the chapters which follow demonstrate that this method has unearthed the core elements of the material constitution of restorative justice.

## **CHAPTER ONE**

University of Cape Town

## Chapter One: Methodological Matters

‘My inquiry led me to the conclusion that neither legal relations nor political forms could be comprehended whether by themselves or on the basis of a so-called general development of the human mind, but that on the contrary they originate in the material conditions of life, the totality of which Hegel, following the example of English and French thinkers of the eighteenth century, embraces within the term “civil society”; that the anatomy of this civil society, however, has to be sought in political economy. The study of this, which I began in Paris, I continued in Brussels, where I moved owing to an expulsion order issued by M. Guizot. The general conclusion at which I arrived and which, once reached, became the guiding principle of my studies can be summarised as follows. In the social production of their existence, men inevitably enter into definite relations, which are independent of their will, namely relations of production appropriate to a given stage in the development of their material forces of production. The totality of these relations of production constitutes the economic structure of society, the real foundation, on which arises a legal and political superstructure and to which correspond definite forms of social consciousness. The mode of production of material life conditions the general process of social, political and intellectual life. It is not the consciousness of men that determines their existence, but their social existence that determines their consciousness. At a certain stage of development, the material productive forces of society come into conflict with the existing relations of production or - this merely expresses the same thing in legal terms - with the property relations within the framework of which they have operated hitherto. From forms of development of the productive forces these relations turn into their fetters. Then begins an era of social revolution. The changes in the economic foundation lead sooner or later to the transformation of the whole immense superstructure. In studying such transformations it is always necessary to distinguish between material transformation of the economic conditions of production, which can be determined with the precision of natural science, and the legal, political, religious, artistic or philosophic - in short, ideological forms in which men become conscious of this conflict and fight it out. Just as one does not judge an individual by what he thinks about himself, so one cannot judge such a period of transformation by its consciousness, but, on the contrary, this consciousness must be explained from the contradictions of material life, from the conflict existing between the social forces of production and the relations of production.’

[Karl Marx: from the *Preface to A Contribution to the Critique of Political Economy* 1859]

## 1.1 Classical and Post-classical Marxism

As its title indicates, this dissertation offers a Marxist analysis of restorative justice. Marxism has always had a troubled and often openly adversarial relationship with the academy. Much of the corpus of modern bourgeois social science has been fashioned in ‘debate with Marx's ghost’.<sup>1</sup> And despite becoming entrenched as ‘part of the mental scaffolding’<sup>2</sup> of modern times, Marxism has been as much misunderstood as it has been maligned, also amongst those concerned with the law.<sup>3</sup> Indeed, in recent years, following the restoration of capitalism in the Soviet Union and the collapse of a host of Stalinist regimes in Eastern Europe, the voices of those declaring the death of Marxism have taken on a triumphalist stridency.<sup>4</sup> Their equation of Stalinism with Marxism typifies the misunderstanding (or mischief) that Marxism has had to contend with in its confrontation with bourgeois social science. It is therefore both necessary and desirable to preface my study of restorative justice by clarifying what I mean by an analysis which is Marxist (and one which is not).

Contemporary Marxism is a contested terrain. There exists a wide variety of schools of Marxism, each laying claim to be the true heir to the legacy of Marx and Engels.<sup>5</sup> They are unified in their overall commitment to a Marxist

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1 Grabb (1990: 14).

2 McLellan (1983: 10). See also Girling (1987: Introduction) who, despite assessing Marx's worldview as ‘too inflexible’, opines that: ‘Without Marx's insights it would not be possible to understand the nature of the problems confronting the modern world - nor find ways to an acceptable solution.’

3 The generally symbiotic relationship between the law and the state tends to instil an uncritical attitude towards and an accommodation with the *status quo* into those involved in the practice and administration of law.

4 See, for example, Vorhies (1991: 108ff). Magnus & Cullenberg (1994: vii) refer to this anti-Marxist trend as ‘the orgy of self-congratulation which followed the 1989 crumbling of the Berlin Wall’.

5 It should be noted that there have been more than one attempt to discern fundamental differences between Marx and Engels on matters such as determinism, dialectical materialism and economism. These efforts are analyzed critically and repudiated by Novack (1978: 85-115) and Timpanaro (1980: 73-133).

worldview. However, the contours and composition of this worldview are the source of perennial debate and cross-criticism. These contending approaches divide conveniently into two broad camps, which may be designated classical and post-classical Marxism.

The classical tradition begins with the writings and political practice of Marx and Engels and continues with such Marxist leaders as Plekhanov, Lenin, Trotsky and Luxemburg. It is a tradition which is demarcated by an organic unity of theory and practice, aimed at comprehending the laws of motion of capitalism and organizing a proletarian assault upon the rule of capital.<sup>6</sup> The post-classical tradition is the temporal successor of classical Marxism and is more or less coterminous with so-called Western Marxism. This is a body of Marxist thought which includes the work of such diverse analysts as Lukacs, Korsch, Gramsci, Sartre, Althusser, Poulantzas, the Frankfurt School, the Analytical Marxists and the *Kapitallogik* school.<sup>7</sup> Each of the major post-classical schools has produced its own systematic and distinctive rendition of Marxism. Post-classical Marxism is thus not unified in the sense that its classical predecessor was. However, it does possess certain generalized features, the most conspicuous of which have been a 'structural divorce of this Marxism from political practice'<sup>8</sup> and a strong analytical focus upon the 'study of superstructures'.<sup>9</sup> There is thus a fairly deep divide, theoretical and political, between classical and Western Marxism.

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6 For a more detailed discussion of the constitution of the classical tradition see Anderson (1979: 1-23).

7 A perspicacious survey of the major theorists and most variants of Western Marxism (except Analytical Marxism and the *Kapitallogik* school) is contained in Anderson's (1979 & 1983) two very useful volumes. For a comprehensive study of Analytical Marxism see Mayer (1994). The *Kapitallogik* approach is competently canvassed in Jessop (1982: 78-141). It may be noted here that the argument of the *Kapitallogik* school owes much to Pashukanis's derivation of the legal form from the commodity form.

8 Anderson (1979: 29). Gramsci is generally acknowledged as the notable exception here.

9 Ibid 75.

This dissertation is informed by the precepts of classical Marxism. It relies primarily upon the works of Marx and Engels and their classical successors. Post-classical sources are enlisted only when and to the extent that they are compatible with the classical tradition. In this regard, regular recourse is had to Trotskyist analysts such as Mandel, Novack, Reed, Callinicos, Slaughter and Pilling.<sup>10</sup> Occasional reference is made also to certain works of Western Marxism where such reference assists to promote the argument from the classical tradition.<sup>11</sup>

This chapter will thus function as a kind of methodological prologue, located within the compass of classical Marxism. It is, of course, not possible to convey the complexity and profundity of any form of Marxism in the space of one chapter. What follows will thus necessarily be truncated and incomplete. Nevertheless, it will attempt, from first principles, to explicate the fundamental elements, and their interrelations, of the classical Marxist worldview.<sup>12</sup>

Marxism is self-consciously revolutionary. It was created and elaborated as a weapon at the disposal of the proletariat in its struggle to overcome the grip of bourgeois ideology and the dominance of the political culture of capital. The Marxist world outlook thus links social analysis directly to social transformation. It is concerned to comprehend capitalism with a view to dismantling, transcending and replacing it with socialism and, ultimately, communism. It is committed to the destruction of the dictatorship of the bourgeoisie and the installation of a dictatorship of the proletariat as precursor to the dissolution of all social classes and the construction of a community of free human beings.

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- 10 The works of these writers are itemized in the References below. According to Anderson (ibid 96-101), it is the Trotskyist strain of post-classical Marxism which has remained most faithful to the classical tradition. Trotskyism is, in this sense, the antithesis of Western Marxism which has abandoned the core concerns of the classical tradition.
- 11 Thus, for example, later in this chapter Lefebvre is cited in support of my exposition of the dialectic and Cohen in support of my argument for the primacy of the forces of production. In Chapter Two Althusser is cited to advance my position on empiricism.
- 12 Henceforward any unqualified reference to Marxism or the Marxist worldview should be read as a reference to the classical tradition, unless the context demands otherwise.

## 1.2 Form and Content

By its nature, any academic work based upon the Marxist analytic abstracts from the revolutionary practical motif of Marxism. Such an academic endeavour can, at best, operate at the level of theoretical critique of bourgeois ideological hegemony in the specific socio-economic, political, legal or cultural terrain being analysed.<sup>13</sup> Its task is to reveal the imperatives which govern the life of the process or relation in question. These are seldom evident. They tend to lie buried under all kinds of bourgeois ideological obfuscations. The form of a relation - which we encounter in our daily lives - invariably does not correspond with its content.<sup>14</sup> It is not 'the form *of* the content'.<sup>15</sup> In fact, the form in which we live the relation conceals its content.<sup>16</sup> The layperson, as a rule, understandably 'mistakes the form for the content'.<sup>17</sup> The serious analyst must avoid this 'commonsense trap'<sup>18</sup> and seek to comprehend the real, material content from which the form in question emerged.<sup>19</sup> Analysis must, in other words, go below the level of appearances, in search of the essential relationships which constitute the dialectic of form and content.

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- 13 See Marx & Engels (1978: 64, original emphasis): 'The ideas of the ruling class are in every epoch the ruling ideas, i.e. the class which is the ruling *material* force of society, is at the same time its ruling *intellectual* force. The class which has the means of material production at its disposal, has control at the same time over the means of mental production, so that thereby, generally speaking, the ideas of those who lack the means of mental production are subject to it.'
- 14 Thus Marx (1974: 817) tells us that 'all science would be superfluous if the outward appearance and the essence of things directly coincided'.
- 15 Slaughter (1980: 109, original emphasis).
- 16 See Larrain (1979: 55).
- 17 Slaughter (1985: 62).
- 18 Humphrey (1993: 7).
- 19 The following statement by Marx (1977b: 38), while specifically applicable to the contest between two political parties (Orleanists and Legitimists), is of obvious general value to the discussion of the form-content relation: 'And as in private life one differentiates between what a man thinks and says of himself and what he really is and does, so in historical struggles one must distinguish still more the phrases and fancies of parties from their real organism and their real interests, their conceptions of themselves from their reality.'

The contemporary concept of restorative justice is a product of the criminological sector of the legal academy.<sup>20</sup> It was developed as a possible solution to the problem of crime which plagues virtually every capitalist social formation in the world, and which has reached desperate proportions in many. In other words, the concept of restorative justice was elaborated as a response to the worldwide capitalist crisis of criminality.<sup>21</sup> The epistemological starting point of a Marxist analysis of restorative justice must be that the concept has no biography or history separate from this crisis of criminality, which is itself one of the expressions of the general structural crisis besetting the capitalist mode of production.

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20 Its immediate origins lie in the tenets of victimology (which it has incorporated and transcended). See Chapter Two below.

21 Following Vermees (1978: 42-67), the notion of a crisis of criminality used in this dissertation refers, essentially, to crime as a mass phenomenon. In other words, a crisis of criminality exists when crime has risen to the level where it becomes a generalized feature of social existence, and hence a serious social problem. Historically, the emergence of crime as a mass phenomenon coincides, more or less, with the rise of the capitalist mode of production. Pre-capitalist societies did not experience the kind of universal criminality which characterizes capitalism. It took a world-historic transformation of the scale required for the installation of bourgeois society to engender a catholic criminality. And contemporary capitalism is burdened by an unrelenting crisis of criminality. See Young (1998: 260): 'Crime has moved from the rare, the abnormal, the offence of the marginal and the stranger to a commonplace part of the texture of everyday life.'

The crisis is epitomized by the steady rise in the crime rate in most capitalist social formations since the Second World War, at least. In this regard, see Rhodes (1977: 14-15), Braithwaite (1989: 44-50), Coleman & Moynihan (1996: 111-122) and Young (ibid: 259-260 & 268-269). To be sure, there have been variations in the form of episodic stabilizations or even falls in the crime rate in certain countries or in respect of certain crimes. And often the public perception of crime levels exceeds the reality. See Reid (1991: 42-46), Conklin (1995: 100-103), Donziger (1996: 1-3), Merlo & Benekos (2000: 172-174) and Beckett (2001: 914-921). But such particularities do not gainsay the overall upward trend in the crime rate, which makes criminality such a conspicuous feature of contemporary capitalism. See Coleman & Moynihan ibid. 121: 'The rate of recorded crime over the last 60 years has shown remarkable resistance to wildly differing economic and social conditions. Through a world war, full employment, the swinging sixties, hyperinflation and economic decline, the crime rate has doggedly continued its skyward projection, apparently unstoppable.'



The point is that, from the Marxist perspective, restorative justice cannot be analysed as a concept on its own terms. It does not have a life of its own, and exists only as one of the ‘celestialised forms’ of the ‘actual relations of life’.<sup>22</sup> Its existence and career are essentially derivative. The concept of restorative justice must, therefore, be comprehended materialistically, in relation to and as an aspect of the social relations of production of the capitalist mode of production. The organizational axis of the capitalist mode of production is the capital-labour relation, which summates in that most basic of capitalist forms, the commodity. The political economy of capitalism begins and ends with the commodity. It is the distillation of all capitalist relations of production and exchange. The academic dissertation which aims to apply the Marxist method to the analysis of restorative justice and its accoutrements must seek, therefore, to discern its juridical connection to the commodity relation.<sup>23</sup> The commodity relation holds the key to unlocking the theoretical constitution of the concept of restorative justice. The remainder of this chapter will thus provide a brief exposition of the analytical tools required for comprehending the commodity relation, namely, the basic philosophical tenets and theoretical concepts of Marxism and its method.

### 1.3 Idealism and Materialism

As intimated in the previous paragraph, the philosophical premise of the Marxist worldview is materialism. All philosophical systems fall into one of two great schools, namely, materialism or idealism. Every philosopher is, at bottom, either a materialist or an idealist. Materialism and idealism are philosophical contraries. They exist in opposition to each other, and the one makes sense only in its relation of contradiction to the other.<sup>24</sup> Idealism gives ontological primacy

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22 Marx (1954: 352 footnote 2).

23 This is also the starting point of Pashukanis’s general theory of law, which forms the theoretical cornerstone of my critique of restorative justice. See Chapter Five below.

24 See Engels (1976: 16ff).

to the mind or the spirit. It encompasses 'any theoretical or practical view emphasizing mind or what is characteristically of pre-eminent value or significance to it'.<sup>25</sup>

There are two basic variants of idealism, namely, the subjective and the objective. The chief exponent of subjective idealism is Berkeley, who pithily expressed the doctrine in the dictum *esse est percipi* (to be is to be perceived). His 'most famous conclusion' is that: 'No object can exist unless it is perceived by someone.'<sup>26</sup> Subjective idealism posits, essentially, that reality is a mental construct. It holds that 'the world exists only for the mind'.<sup>27</sup> Matter is conceived in the mind, and the material exists by virtue of its being thought. The consistent subjective idealist must, in the end, stake everything on the human mind and deny matter any independent existence separate from the constructs of the mind.

Objective idealism, by contrast, comprehends reality in terms of a universal which has an existence independent and outside of the human mind. Hegel, for example, conceived of material reality as the exemplification of the Absolute Idea and of the movement of history as the manifestation of the World Spirit.<sup>28</sup> The objective idealist thus does not ascribe matter to mind, but to Mind, that is, an objective universal which is not a product of or dependent upon the human mind. Thus, while objective idealism does not deny the existence of matter, it does subjugate matter and its movement to the thrall of the universal Mind.

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25 Runes (1966: 136).

26 Bennett (1971: 138).

27 See Runes op cit 303.

28 See Novack op cit 316.

Despite their differences, subjective and objective idealism are united in their rejection of materialism. All committed idealists insist, and must insist, that the material is an expression of the non-material. The latter is the independent variable, the former the dependent. Whether it relies upon the human mind as the source of material reality or upon a universal with its being outside the human mind, idealism is committed epistemologically to the non-material as the ultimate source of material reality. The corporeal is subsumed in the incorporeal. The human idea or the universal Idea is the motor of history. The mind/Mind is elevated to the level of *explanans*. In fine, idealism in both its major versions posits the relationship between the material and the ideal as being one of mind/Mind over matter.

By contrast, materialism prioritizes matter. For the materialist, reality is material, first and foremost. The fundamental materialist postulate is that ‘matter is the primordial substance, the essence, of reality’.<sup>29</sup> Materialism does not deny the existence of mind or its role in the comprehension and transformation of matter. But it does insist that the material precedes the ideal, that nature predates consciousness. Matter has an objective existence, prior to and independent of mind.<sup>30</sup> Indeed, for the materialist, mind constitutes the highest form of the organization of matter. Mind is, in a word, what the brain does.<sup>31</sup> Materialism thus understands mind as a dependent variable in its relation to matter. The relationship between mind and matter is summed up by Novack in the following terms:

‘According to materialism, matter produces mind, and mind never exists apart from matter.’<sup>32</sup>

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29 Novack (1965: 4).

30 See Humphrey (1993: 15ff) who refers to the epoch before life emerged on earth as a ‘mindless stage of history’. Minds need brains to exist.

31 See Searle (1984: 13ff) and Evans & Deehan (1991: 85ff).

32 Novack op cit 4.

The materialist ontology thus gives precedence to matter as it occurs in nature. The ideal derives its being from the material, with every non-material phenomenon or relation being an expression of a determinate array of matter.

#### 1.4 Monism and Dualism

Materialism thus inverts the idealist postulate. The relationship between mind and matter is reversed, to foreground the determining role of the material in the constitution of reality. Whereas idealism has mind as its organizing and explanatory motif, materialism relies upon matter for this purpose. Interestingly, both idealism and materialism, in so far as they are consistent, are monist in their world outlook. Both rely, as Plekhanov expresses it, upon ‘explaining phenomena with the help of some one main principle’.<sup>33</sup> Both eschew the dualism which routinely characterizes the many attempts to reconcile idealism with materialism or to find a *via media* between the two.<sup>34</sup>

Monism is an important attribute of materialism. It is a conduit to the comprehension of reality as a complex but single organic unity. Whereas the dualist posits the real world as a unity of discrete levels or compartments, the monist proceeds on the basis that reality is an indivisible whole, which has to be comprehended as such. The monist concept can assist, for example, to make sense of an issue which is germane to the Marxist analysis of restorative justice, namely, the so-called base-superstructure metaphor. This relation has been a major item of debate and disagreement in the history of Marxism. It is submitted, however, that this seemingly intractable question stems, in large part, directly from a curious neglect of the monist fundamentals of Marxism. The matter will be canvassed in more detail in the latter part of this chapter.

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33 Plekhanov (1956: 14).

34 Kant's distinction between phenomena and noumena is a good example of the kind of dualism which attempts to avoid the choice between idealism and materialism.

## 1.5 Dialectical and Formal Logic

The Marxist worldview is then, to begin with, uncompromisingly materialist (and hence monist). It is a view consummately expressed by Marx himself when, differentiating his materialism from Hegel's idealism, he explains:

‘To Hegel, the life process of the human brain, ie the process of thinking, which, under the name of “the Idea”, he even transforms into an independent subject, is the demiurgos of the real world, and the real world is only the external, phenomenal form of “the Idea”. With me, on the contrary, the ideal is nothing else than the material world reflected by the human mind, and translated into forms of thought.’<sup>35</sup>

But Marxism's is not a generic materialism which merely posits matter as prior to mind, or consciousness as secondary to being. The materialism of Marxism is also, and vitally, distinguished from other forms of materialism by its method: the dialectic. Engels taught us that ‘motion is the mode of existence of matter’.<sup>36</sup> The dialectical method of Marxism seeks, simply, to comprehend matter in its natural condition, that is, of constant and internally contradictory motion. The insight that matter exists in motion renders invalid the thing as object of cognition.

Dialectical materialism thus posits a world of matter as relation. ‘Every determinate existence is a relation.’<sup>37</sup> Instead of a collection of discrete objects, the world is made up of a matrix of relations, in constant and contradictory interaction. What is more, each relation, insofar as it has an individual existence, is internally a cluster of contradictions, which is the source of its self-development and change. The dialectical method seeks to capture the movement which is reality. It seeks to comprehend every relation for what it really is, namely, a contradictory unity of opposites. It thus also seeks to comprehend the struggle

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35 Marx (1954: 29).

36 Engels (1934: 70).

37 Lefebvre (1970: 33).

between opposites which is at the heart of every relation. The dialectical method is, in a word, 'the logic of matter in motion and thereby the logic of contradictions'.<sup>38</sup>

Dialectics thus seeks to comprehend the 'secret life' of matter, which is one of motion, continual and contradictory, through various levels of development and decay. It entails, according to Engels, a methodological disposition which is informed by the:

'great basic thought that the world is to be comprehended not as a complex of ready-made things but as a complex of processes, in which apparently stable things no less than the concepts, their mental reflection in our heads, go through an uninterrupted change of coming into being and passing away'.<sup>39</sup>

Marx makes a similar point, endorsing Engels's statement:

'In its rational form, [the dialectic] is a scandal and abomination to bourgeoisdom and its doctrinaire professors, because it includes in its comprehension and affirmative recognition of the existing state of things, at the same time also, the recognition of the negation of that state, of its inevitable breaking up; because it regards every historically developed social form as in fluid movement, and therefore takes into account its transient nature not less than its momentary existence; because it lets nothing impose upon it, and is in its essence critical and revolutionary'.<sup>40</sup>

The dialectical dimension of Marxist materialism was elaborated in opposition to the epistemological tradition which Marxists (following Hegel) generally label as metaphysics.<sup>41</sup> This rubric refers to any 'philosophical system that arbitrarily divides up reality into a series of externally imposed and unchanging categories'.<sup>42</sup>

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38 Novack (1971: 94).

39 Engels (1976: 41).

40 Marx op cit 29.

41 Engels op cit 42.

42 Novack (1978: 313). Matter is conceived to be either at rest or in linear motion from one inert nodule to another. In other words, the only motion which the metaphysician comprehends is mechanical, the mere displacement of a thing from one point of immobility to another. Metaphysical cognition is premised upon the thing, as opposed to the relation, as the elemental unit of reality. Each thing is a determinate organization of matter, complete in itself. Each phenomenon is an isolated entity with fixed properties.

Metaphysical cognition is grounded in inertia and linearity. Pre-Marxist materialism was dominated, for the most part, by metaphysics. Engels refers to metaphysics as the 'old method of investigation and thought' which 'preferred to investigate *things* as given, as fixed and stable'.<sup>43</sup>

Metaphysical principles of cognition did not comprehend the dialectic. Instead, they relied upon the laws of formal logic, that is, a logical system which eschews change and contradiction. The centrepiece of formal logic is the notion of identity in terms of which every thing, every phenomenon is always identical only to itself.<sup>44</sup> It is a logic which embraces stasis and which banishes motion. It is a method which is founded upon the axiom that rest is the natural condition of all matter and which understands change and development as exceptions to this true condition. Via the axioms of formal logic, metaphysics ousted contradiction - the prime defining condition of motion and hence of matter - from the process of cognition.

Marx and Engels rescued materialism from metaphysics by detaching it from the strictures of formal logic and basing it instead on the laws of dialectical logic (taken from Hegel). This enabled them to transcend 'the old method of investigation and thought'. The dialectic injected motion into the analysis of matter, thereby illuminating cognition with the truly radical principle that the extant arrangement of the material world was neither changeless nor permanent.

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43 Engels op cit 42, original emphasis.

44 This notion of identity is usually stated in the three basic principles of formal logic: the principle of identity (X is equal to X); the principle of contradiction (X is not equal to non-X); and the principle of the excluded middle (a thing is either X or not X). These principles mean that: everything is always absolutely identical to itself; nothing can ever simultaneously be itself and not itself; everything always exists in complete isolation of its opposite. Collectively, these three principles form the core of the metaphysician's commitment to a logic of identity. See Pilling (1980: 39-40), Mandel (1979: 160-161) and Novack (1971: 15-53).

Whereas metaphysics posited fixity or, at best, mechanical motion, dialectics embraced change. Whereas metaphysics relied upon identity, dialectics proceeded from contradiction. Dialectical materialism not only posits motion as the mode of existence of matter; it also holds that all motion is ‘utterly, explicitly, even rudely contradictory’<sup>45</sup> and that contradiction is the true source of change and development. Mandel sums up the substance of the dialectical method in the following terms:

‘The study of every object, phenomenon or set of phenomena ought to have as its aim the discovery of its constituent contradictory elements, and of the motion and dynamic unleashed by these contradictions.’<sup>46</sup>

The dialectic applies as much to the products of human thought as it does to social products. Mental constructs, including the concept of restorative justice, should thus be analysed in terms of a dialectic of knowledge, aimed at comprehending the ensemble of contradictions comprising its inner life. This is exactly what Marx achieved so superbly in his critical analysis of the laws of motion of the capitalist mode of production. It is also what a Marxist analysis of the concept of restorative justice should aim to achieve.

## 1.6 Against Triadicity

It must at this stage be made absolutely clear that the Marxist dialectic cannot be reduced to the clichéd triad of thesis-antithesis-synthesis.<sup>47</sup> Certainly, Hegel, the acknowledged father of modern dialectical thought, was by no means a proponent of such a formulaic approach to the dialectic. In fact, he appears to have avoided consciously the three-term construction which is so regularly

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45 Novack *ibid* 43.

46 Mandel *op cit* 162. See also Pilling *op cit* 32: ‘For Marx, an opponent of metaphysical and purely formal thought, contradiction was the form taken by all development. Thought, if it was to be truly scientific, must consciously aim to express the contradictions in the phenomenon it was investigating.’

47 Wood (1984: 197).



attributed to him. Thus Wood points out that ‘Hegel almost never uses’ the ‘tedious and uninformative jargon of “thesis-antithesis-synthesis”’.<sup>48</sup> And McBride confirms that Hegel:

‘very seldom invokes the rigid terminology of “thesis-antithesis-synthesis”, and yet manages to remain a dialectician.’<sup>49</sup>

Marx, too, roundly rejected the lure of triadicity in his conjoining of the Hegelian dialectic to materialism. Thus, Swingewood notes that ‘in Marx’s many analyses of society and history he never made use of these terms’.<sup>50</sup> Wood points out that Marx uses the language of the triad ‘only once, and solely for the purpose of parody’.<sup>51</sup> And Lenin tells us of Marx scoffing at the ‘wooden trichotomies’ to which a detractor had reduced materialist dialectics.<sup>52</sup>

The real objection to the triadic summation of the dialectic is the fact that it tends to distort and to simplify complex and often problematic processes and relations in an effort to fit them into the formula. It encourages linearity in thought and restricts us to the ‘superficial and external aspect of our mode of cognition’.<sup>53</sup> It condones a mechanistic approach to the dialectic: a relation which does not fit neatly into the schema, which lacks one of the terms, is excluded from dialectical cognition.

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48 Ibid.

49 McBride (1977: 53).

50 Swingewood (1975: 15).

51 Wood op cit 197.

52 Lenin (1976: 15).

53 Lefebvre op cit 44-45.

The conventional three-term formula is simply inadequate to grasp the undetermined contours of dialectical motion.<sup>54</sup> The triadic conception of the real movement of matter permits the intrusion of the spirit of formal logic into the dialectic and sets formal parameters for dialectical logic. It formalizes the dialectic and, ultimately, delivers it to metaphysics. The Marxist method is aimed at grasping the contradictory fundament of all relations. Dialectical materialism is about attempting to comprehend reality for what it is, that is, a complex of contradictory relations, both internally and externally. It involves, essentially, an analytical endeavour to comprehend the content of form. This requires an elimination of the formal method.<sup>55</sup> The triad, in fact, undermines the dialectic by providing a refuge in it for the formal method. Dialectical materialism must therefore avoid the attractive simplisms of triadicity, for they lead inexorably to the analytical pitfalls of formal logic.<sup>56</sup>

### 1.7 For Historicity

The fact that matter, the foundation of objective reality, exists only, and can exist only in dialectical motion leads to the other fundamental dimension of Marxist materialism, namely, its historical-mindedness or historicity. All motion entails time (and space). Movement necessarily takes place over time. Matter can thus exist only in time (and space) and, hence, in history. Dialectical materialism is therefore perforce also a historical materialism. The old metaphysical

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54 There is here an unbridgeable chasm between dialectical and formal logic. The former prizes contradiction, the latter abhors it. Contradiction is the heart of the dialectic. Every process is internally contradictory, every relation comprises a struggle of opposites. Every 'thing' contains its own negation and is always in the process of becoming its own opposite. Every 'thing' is, in truth, a relation containing the 'thing' and its negation. The dialectical method seeks to uncover the existential turbulence which structures the evolution of all social relations.

55 Lefebvre op cit 81.

56 Thus Slaughter (1975: 16-17) considers it 'absolutely against the spirit of dialectics to artificially impose the "triad" of thesis, antithesis, and synthesis on whatever process one chooses to abstract'.

materialism was ahistorical. It abstracted from history. It conceived of the world as given. Whatever movement it recognized was mechanical and repetitive, linear and circular. Metaphysical materialism thus banishes history or, at best, condemns it to repeat itself endlessly. For Marxism, however, materialism remains incomplete unless and until it is infused with the historical aspect.<sup>57</sup> In particular, it must comprehend the material relations of humankind historically.

Historical materialism teaches that human society must be treated as the historical product of purposive human activity upon nature.<sup>58</sup> To the extent that it is a determinate form of matter, human society may be said to be a natural construct. But its naturalness is always historically defined and hence subject to change over time. In other words, whereas the naturalness of human society is transhistorical, the form of this naturalness is fundamentally historical. This form varies according to the character of human material relations in a given historical epoch. That is, our relationship to nature is materialized in historically specific social relations of production and their institutional concomitants. Human society is thus a complex of historico-natural relations, which relations differ according to the extant mode of production. Each social formation should be viewed as the specific product of 'a process of natural history'.<sup>59</sup>

Marxism does not separate history from philosophy or sociology from epistemology. Dialectical materialism and historical materialism are not discrete methodologies; they are the defining components of the Marxist *Weltanschauung* which is fundamentally monist and materialist. In this connection, the basic Marxist submission is that materialism can be properly dialectical only if it is simultaneously historical, and that, in order to avoid the morass of idealism, the

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57 See Slaughter *ibid* 30.

58 Sociality has its origins in the human quest to survive the treacheries of nature.

59 Marx *op cit* 21. See also Marx & Engels *op cit* 62-63.

dialectic must be conjoined with history. Matter, in all its forms of organization, is constituted dialectically, in history. The dialectical transformations of matter involve developments which take place in and over time. They are, thus, also historical transformations.

It is this grounding of philosophical materialism in the process of (natural) history which separates Marxism from all previous materialisms. Marxism propounds a materialism which is historical because it is dialectical. To separate the dialectic from history, to conceive of dialectical materialism and historical materialism separately, as belonging to different spheres of enquiry, is to misunderstand and to undermine the achievement of Marx and Engels in transcending the limitations of the metaphysical worldview. Their materialism is a unity of the dialectical and the historical. Marxism does not admit of epistemological apartheid: the dialectical must be comprehended historically, and the historical dialectically.

### **1.8 Sociality and Historicity**

The articulation of the dialectical and historical dimensions of Marxist materialism governs the Marxist method of social analysis. A Marxist investigation into any society or its institutions, including the law, can proceed from one premise only: the production of material life. This is the fundamental materialist precept. Thus Marx and Engels refer us to:

‘the first premise of all human existence and, therefore, of all history, the premise, namely, that men must be in a position to live in order to be able to “make history”. But life involves before everything else eating and drinking, a habitation, clothing and many other things. The first historical act is thus the production of the means to satisfy these needs, the production of material life itself. And indeed this is an historical act, a fundamental condition of all history, which today, as thousands of years ago, must daily and hourly be fulfilled merely in order to sustain human life.’<sup>60</sup>

In order to exist, then, humankind must produce the material means of its existence. And in order to do so, human beings must co-operate, they must work together upon and against nature. For Marxism, 'the irreducibly social nature of production'<sup>61</sup> is a first principle, as appears from the following statement by Marx:

'In the process of production, human beings work not only upon nature, but also upon one another. They produce only by working together in a specified manner and reciprocally exchanging their activities. In order to produce, they enter into definite connections and relations to one another, and only within these social connections and relations does their influence upon nature operate, i.e., does production take place.'<sup>62</sup>

The imperatives of survival thus require humans to enter into social relations of production, that is, to join together in order to organize a division of labour according to which the production of life's necessities is undertaken.

Thus, human production (and hence reproduction) is necessarily co-operative, a characteristic which entails the social. Material production thus engenders society. In this regard, the essence of humanity is sociality, and the necessity of this sociality is a transhistorical one. At any point in history, human life can exist and continue to exist only if humans enter into social relations of production. In its analysis of social life, the focus of Marxism is thus upon the social relations of production in terms of which all human societies are constituted. However, the form of these social relations of production is neither given nor fixed. Generic social relations of production which are historically uniform do not exist. Social relations are produced by human activity, at a particular time, in the material production and reproduction of humankind. In other words, they are always definite or historically specific. And they are general only in the sense that they are the primary determinant of the nature of human

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61 Sayer (1987: 24).

62 Marx (1932: 28).

relations at a particular conjuncture. They constitute the economic structure, that is, the organization of material production that prevails or is dominant in a given social formation during a particular historical period.

### 1.9 The 1859 *Preface*

The social relations of production (economic structure or base) comprise the area of intersection between two sets of determinations. The first relates to the character of the relations of production. This depends crucially upon the forces of production (material substructure) in that the relations of production which characterize a particular historical epoch are generally determined by the level of development of the forces of production.<sup>63</sup> The second set of determinations relates to the ideational dimensions of social reality (the non-economic superstructure). These are determined generally by the extant social relations of production.

So it is possible to conceive of social reality in terms of two interrelated levels of determination: on the one hand, the material substructure determines the economic structure; on the other hand, the economic structure determines the non-economic superstructure. Marx's own summary of these relations of determination, contained in the 1859 *Preface*, is justly famous:

‘In the social production of their existence, men inevitably enter into definite relations, which are independent of their will, namely relations of production appropriate to a given stage in the development of their material forces of production. The totality of

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63 It is generally accepted that the forces of production include, at least, the means of production (raw materials, machinery, buildings, etc) and labour power. This may be termed the material aspect. Most analysts also inject a social dimension into the concept. Thus, Slaughter (op cit: 38) tells us that: ‘By “forces of production” Marx does not only mean techniques, or implements, or natural forces harnessed by technique. He places the actual forms of co-operation between men in labour among the forces of production ... When Marx writes of “forces of production” he therefore means the totality of the developed ability of man to confront and transform nature.’ See also Novack (1978: 306), Larrain op cit 77 and Sayer op cit 26-27.

these relations of production constitutes the economic structure of society, the real foundation, on which arises a legal and political superstructure and to which correspond definite forms of social consciousness. The mode of production of material life conditions the general process of social, political and intellectual life. It is not the consciousness of men that determines their existence, but their social existence that determines their consciousness.'

Many commentators have, correctly, viewed this passage as the fundament of the Marxist approach to social analysis. The hostile ones have used it to condemn Marxism, incorrectly, as an economic determinism, in the sense that it supposedly sees 'all human behaviour as a mechanical effect of economic pressures'<sup>64</sup> or that it allegedly posits that 'all human actions are causally determined by factors wholly outside the agent's control - in Marx's case, by "economic" factors'.<sup>65</sup> This view has, bizarrely, been encouraged by the theoretical offerings of the Stalinist epigones of Marx, which offerings have routinely reduced Marxism to precisely the economic determinism which is the rallying cry of its detractors.

However, whereas a charge of economic determinism against Stalinism is thus a legitimate one, against Marxism it is, as will be argued later, spurious. Yet, there has appeared a number of reconstructionist publications which, although either avowedly 'Marxist' or at least sympathetic to Marxism, accepts that the *Preface* does allow, perhaps even encourages, economic determinism, and hence seeks to develop a Marxism which is not contaminated by the perceived inadequacies of the *Preface*. The work of Cain, Hunt, Collins, Larrain, Fine, Sayer and Davis are good examples of this reconstructionist tendency.<sup>66</sup>

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64 Slaughter (1985: 33).

65 Wood op cit 63.

66 See Cain & Hunt (1979), Hunt (1993), Collins (1984), Larrain op cit, Fine (1984), Sayer op cit and Davis (1988a).

It is submitted, however, that the *Preface* has nothing whatsoever to do with the crassness of economic determinism and is instead a reliable expression of the core tenets of dialectical and historical materialism. It sets out unambiguously how Marx himself understood the crux of the Marxist analytic. Of course, the value of the *Preface* should not be overestimated. It is not the last word on the method of Marxism. In fact, it is no more than a summary, and one in a condensed form, of that method. As such, it cannot convey the fulness and subtlety of the method itself. It is obviously inadequate to equate the summary of the method with the method itself, as so many commentators are wont to do. Still, Marx himself did describe the summary as 'the guiding principle of my studies'. In other words, he did present it as a valid general statement of his method.

The 1859 *Preface* can be relied upon therefore, legitimately, as the methodological point of departure of Marxism. Of course, it cannot be read as an exposition of a law of social development, 'analogous, for instance, to Boyle's law or Ohm's law in the physical sciences'.<sup>67</sup> Marx certainly never claimed for it the status of a law. He did not even assert that the *Preface* contained a complete statement of his social theory, nor did he consider the conceptual framework proposed in the *Preface* to constitute a model into which social reality must fit. It bears repeating that for Marx the *Preface* was a summary of his materialist 'guiding principle', reached in the course of settling accounts with Hegelian idealism. It must therefore be taken for what it was intended to be, namely, a guide to social analysis, founded upon philosophical materialism, and providing a method to investigate the complex unity of contradictory relations which constitutes objective reality.

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67 Carver (1982: 22).



### 1.10 The *Preface* and the Reconstructionists

As indicated earlier, and despite the clarity of the ‘guiding principle’ as stated in the *Preface*, many commentators who would associate themselves with Marxism, have questioned its coherence and offered their own reconstructions of Marx's theoretical schema. Faced with the distortions of Stalinist orthodoxy and sensitive to the accusations of economic determinism, these analysts have sought to rescue Marxism by proposing purportedly non-deterministic readings of the *Preface*. These may be divided into two broad categories, related to the above-mentioned two sets of determinations.<sup>68</sup>

Firstly, there are those efforts which suggest that the relationship between the forces of production and the relations of production as established in the *Preface* be inverted. Whereas the *Preface* ascribes primacy to the forces of production over the relations of production, these reconstructionists assign priority to the latter. For them, it is the relations of production which determine the forces of production. They believe that the development of the forces of production is dependent upon movement in the relations of production which permit such development. Anderson typifies this school, as is evident from the following proposition:

‘[O]ne of the most important conclusions yielded by an examination of the great crash of European feudalism is that - contrary to widely received beliefs among Marxists - the characteristic “figure” of a crisis in a mode of production is not one in which vigorous (economic) forces of production burst triumphantly through retrograde (social) relations of production, and promptly establish a higher productivity and society on their ruins. On the contrary, the forces of production typically tend to *stall* and *recede* within the existent relations of production; these then must themselves be radically changed and reordered *before* new forces of production can

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68 The first set comprises the forces of production and relations of production and the second set the relations of production and superstructure.

be created and combined for a globally new mode of production. In other words, the relations of production generally change *prior* to the forces of production in an epoch of transition, and not vice versa.<sup>69</sup>

Those who share with Anderson the belief in the primacy of the relations of production include Hook,<sup>70</sup> Magaline<sup>71</sup> and Balibar.<sup>72</sup>

Attractive as this position may appear to analysts wishing to avoid the distortions of Stalinist orthodoxy, it is a fundamentally unMarxist position. Marx and Engels were unequivocal about the primacy of the forces of production in their relationship to the social relations of production. Cohen shows indisputably that throughout their writings, from the 1840s to the 1890s, Marx and Engels were and remained totally committed to the 'primacy thesis' which holds, in Cohen's terms, that 'the nature of a set of production relations is explained by the level of the productive forces embraced by it'.<sup>73</sup> This unwavering commitment has prompted Larrain to inquire why Marx was 'so emphatic in asserting the primacy of productive forces in his general theoretical statements about history'?<sup>74</sup> The answer to this apparently problematic question is simple and singular: both Marx and Engels were materialists through and through. By the time they had completed their critiques of Hegel and Feuerbach, they had also constructed the dialectical and historical materialism which was to inform all their subsequent theoretical and analytical work.

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69 Anderson (1981: 203-204, original emphasis).

70 Hook, S. (1933) *Towards an Understanding of Karl Marx*, cited in McMurtry (1978: 15 footnote 24).

71 Magaline, A. (1975) *Lutte de Classes et Devalorisation du Capital*, cited in Larrain op cit 114.

72 Balibar (1970: 233ff).

73 See Cohen (1984: 134-150).

74 Larrain op cit 88.

This adherence to materialism in philosophy led (and should lead any self-respecting materialist) necessarily to the 'primacy thesis' as defined by Cohen. Lenin, too, was uncompromisingly materialist in his view of the world. This emerges clearly in his description of historical materialism as 'the consistent continuation and extension of materialism into the domain of social phenomena'.<sup>75</sup> The primacy of the productive forces is entailed in the materialist conception of history. The level of development of the material forces of production determines the character of the social relations of production (the economy). Cohen's defence of Marx on this point is indefeasible. Those reconstructionists who posit the primacy of the relations of production must, ultimately, abandon materialism - and Marxism.

The second, and very popular, type of reconstructionism is concerned with the so-called base-superstructure problem, that is, the relationship between the social relations of production (the base) and the superstructure. Marx, again, is unambiguous about this relationship in the 1859 *Preface*: the economic structure determines the legal and political superstructure; the base is the 'real foundation' of the superstructure. Slaughter makes the point thus:

'It is the relations between men in production which form the economic base or economic structure, determining the characteristic legal, political and ideological forms of each society.'<sup>76</sup>

Again, this primacy of the base over the superstructure follows necessarily from the materialist premises of Marxism. The priority of matter over mind, and hence of being over consciousness, implies that the origin of superstructural transformations must be sought in the movements of the economic structure, that is, the social relations of production. This basic materialist conclusion has been

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75 Lenin op cit 17.

76 Slaughter (1975: 37).

strangely, some would say wilfully,<sup>77</sup> misinterpreted by numerous analysts, who have espied in the determinism of Marx the spectre of the crude economic determinism of vulgar materialism or the technological determinism of Stalinism adverted to earlier in this chapter.

Despite the fact that Engels, in a cycle of letters written in the last decade of the nineteenth century,<sup>78</sup> both warned against a simplistic notion of determination and clarified the relationship between the base and the superstructure, the self-styled opponents of Marxist 'orthodoxy' have persisted with their reconstructions. They ignore Marx's own writings which supplement and flesh out the 'guiding principle' of the *Preface*,<sup>79</sup> and they belittle Engels's efforts to combat the vulgarization of the *Preface*<sup>80</sup> so that they may tell us, contrary to the explicitness of the *Preface*, what Marx really meant. They are not at all averse to the notion that Marx and Engels may not really have meant what they actually said. Thus, at least one reconstructionist has gone so far as to claim that 'occasionally Marx's own version of his theoretical activity may be incongruous with the real significance of it'.<sup>81</sup> It is now apparently necessary to save Marx from his own intellectual incompetence!

### 1.11 Rendering Marxism More Profound

None of the reconstructionists argues for the primacy of the superstructure over the base. That would be too blatant a capitulation to idealism. Instead, they question whether the base-superstructure divide established in the *Preface* is capable of comprehending the real relationship between the economy and such

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77 See Guest (1939: 60).

78 See letters to Schmidt 5 August 1890; to Bloch 21-22 September 1890; to Schmidt 27 October 1890; to Mehring 14 July 1893; and to Borgius 25 January 1894, all in Marx & Engels (1975).

79 See, for example, Marx (1977) and Marx (1954).

80 See his letters on historical materialism cited above. See also Engels (1934).

81 Larrain op cit 9.

typically superstructural aspects as law, politics, and ideology. Notwithstanding the many occasions on which Marx and Engels made clear that their 'guiding principle' must be understood dialectically, the reconstructionists find that the base-superstructure metaphor is too static<sup>82</sup> and simplistic<sup>83</sup> to grasp the complexities of social reality. They aim to render Marxism more profound, to inject into Marxism the subtlety which Marx and Engels were apparently unable to provide.

However, the reconstructionist quest for subtlety leads quickly to an assault upon the integrity of the 'guiding principle' itself and to the conclusion that its central division between base and superstructure is untenable and indefensible. They collapse the distinctions identified by Marx, arguing that each is contained within the other and hence constitute a single, indivisible reality. The case of law is paradigmatic in this regard. For Marx and Engels law is an aspect of the superstructure. As such, that is, as a superstructural effectivity, law can and does condition the form of the relations of production.<sup>84</sup> But Marx and Engels were uncompromisingly committed to the primacy of the relations of production in this relation: whereas they allowed that legal relations can sometimes determine the form of the relations of production, they were adamant that it is the content of the relations of production which always determines the legal form. That is classic and consistent dialectical materialism from the founders of Marxism.

Evidently, however, for our reconstructionists, a 'mere' dialectical apprehension is not good enough to clarify the true relationship between law and economy. A graphic sample of the reconstructionists' avowed non-determinist approach to this relationship is Thompson's passionate and picturesque outburst:

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82 Ibid 110.

83 See Cain & Hunt op cit 50 and Hunt op cit 203.

84 See Marx & Engels (1978: 58) and Engels's letter to Bloch 21-22 September 1890 in Marx & Engels (1975).

‘For I found that law did not keep politely to a “level” but was at every bloody level; it was imbricated within the mode of production and the production relations themselves (as property rights, definitions of agrarian practice) and it was simultaneously present in the philosophy of Locke; it intruded brusquely within alien categories, re-appearing bewigged and gowned in the guise of ideology; it danced a cotillion with religion, moralising over the theatre at Tyburn; it was an arm of politics and politics was one of its arms; it was an academic discipline, subjected to the rigours of its own autonomous logic; it contributed to the definition of self-identity both of rulers and ruled; above all, it afforded an arena for class struggle, within which alternative notions of law were fought out.’<sup>85</sup>

Thompson's frontal assault upon the supposed analytical deficiencies of the 1859 *Preface* has been joined, in somewhat more subdued terms, by a host of other anti-reductionists and non-instrumentalists. They all adhere or tend towards adherence to one proposition: that law is not a dependency but a specificity. That is, they tell us that the legal form is not in fact a superstructural configuration; it is, in truth, a relation of production! Thus, Fine asserts that law is ‘an essential relation of production’;<sup>86</sup> Hunt advises that ‘the legal relation is itself constitutive of the relations of production’;<sup>87</sup> and Collins holds that ‘legal rules actually constitute, define and express the relations of production’.<sup>88</sup>

In their concern to avoid the perceived ‘limitations and simplifications of the base/superstructure metaphor’,<sup>89</sup> said reconstructionists have also succeeded in avoiding Marxism. For, none but the most myopic can fail to notice that the dialectical materialist conception of law and all other superstructural forms developed by Marx and Engels has no relation whatsoever to notions of legal relations as relations of production or as constitutive of relations of production. Marxism has discerned and been alive always to the possible impact of law upon

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85 Thompson (1978: 288).

86 Fine op cit 146.

87 Hunt op cit 207. This book is sub-titled, significantly, ‘Toward a Constitutive Theory of Law’.

88 Collins op cit 89.

89 Cain & Hunt op cit 50.

the form of the relations of production; but it has also been always categorical that legal relations must be grasped with reference to their material roots in the relations of production. In other words, Marxism posits that the relationship between legal forms and production relations is fundamentally asymmetrical in that the latter is the source of and determines the former. Reconstructionists, by contrast, favour a symmetry between law and economy. They claim to have discovered an identity between legal relations and relations of production, or that the former is constitutive of the latter. In their endeavours to render Marxism more profound they jettison its core materialist premises.

All the reconstructionists - both those who assert the primacy of the relations over the forces of production and those who claim a decisive role for superstructural configurations in the constitution of the relations of production - proceed from the conviction that the concepts (and their interrelations) contained in the 1859 *Preface* are not rich enough to comprehend the complexity of our social reality. They rely in their reconstructions on other works of Marx, such as *Capital*, the *Grundrisse* and *Theories of Surplus Value*, which are supposed to provide a richer theoretical terrain than the *Preface*. They forget two things.

Firstly, they forget that in all of his subsequent writings, Marx never even hinted at any deficiencies in his 'guiding principle' of 1859; and that Engels's subsequent writings on historical and dialectical materialism were not about correcting the 'guiding principle' but about defending it and correcting errors which others had committed in its name.

Secondly, they forget that in Volume 1 of *Capital*, the only volume which he himself saw through to publication and which nobody doubts is his analytical *meisterwerk*, Marx was explicit and unapologetic in his defence of his 'guiding principle' as formulated eight years earlier. It merits full quotation:

'I seize this opportunity of shortly answering an objection taken by a German paper in America, to my work, "Zur Kritik der Pol. Oekonomie, 1859". In the estimation of that paper, my view that each special mode of production and the social relations corresponding to it, in short, that the economic structure of society, is the real basis on which the juridical and political superstructure is raised, and to which definite social forms of thought correspond; that the mode of production determines the character of the social, political and intellectual life generally, all this is very true for our own times, in which material interests preponderate, but not for the middle ages, in which Catholicism, nor for Athens and Rome, where politics, reigned supreme. In the first place it strikes one as an odd thing for any one to suppose that these well-worn phrases about the middle ages and the ancient world are unknown to anyone else. This much, however, is clear, that the middle ages could not live on Catholicism, nor the ancient world on politics. On the contrary, it is the mode in which they gained a livelihood that explains why here politics, and there Catholicism, played the chief part. For the rest, it requires but a slight acquaintance with the history of the Roman republic, for example, to be aware that its secret history is the history of its landed property. On the other hand, Don Quixote long ago paid the penalty for wrongly imagining that knight errantry was compatible with all economic forms of society.'<sup>90</sup>

It would be hard to find a more direct denial of the validity of the reconstructionist project. The original Marxists were and remained unrepentant materialists and unreconstructed determinists.

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90 Marx (1954: 86 footnote 2).



### 1.12 The Unity of Social Reality

Much of the reconstructionists' striving after a deeper and more sophisticated understanding than can allegedly be attained via the conceptual apparatus of the *Preface* is founded upon the argument from the wholeness of social reality. They link their rejection of the perceived simplisms of the *Preface* to the 'discovery' that the real world is a single, indivisible whole which does not consist of separate levels. The fundamental unity of social reality renders useless the attempt to separate it out into discrete planes, however interconnected these might be conceived. In consequence, it is urged, the differentiation between the forces and relations of production is uninformed and that between base and superstructure untenable. Thus, for example, Sayer tells us that the 'forces/relations distinction as conventionally drawn must accordingly collapse';<sup>91</sup> and Collins posits that 'it makes little sense to ask if some of the laws we have looked at are in the base or the superstructure'.<sup>92</sup>

Now, the insight that social life comprises a seamless totality is incontrovertible. It would be either sheer folly or supreme arrogance for any serious analyst even to consider contesting the essential oneness of existence. Objective reality is indeed an incorruptible unity which cannot be disassembled into independent elements. The problem is that most reconstructionists (Sayer is a notable exception here) wield this truism like an indictment against Marx and Engels, as if they were inexplicably ignorant of it.<sup>93</sup> They presume that the progenitors of Marxism were somehow unable to comprehend this most basic feature of socio-economic life and incorporate it into their worldview. They forget that because Marx and Engels were materialists through and through, they were also, as intimated earlier, monists through and through. In other words, they

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91 Sayer op cit 37.

92 Collins op cit 90.

93 Recall Thompson's tirade cited earlier.

would have no truck with the dualist shenanigans which are the philosophical source of the stratospheric conception of social life. They thus took the essential oneness of the world for granted. 'The concept of *totality* is central to Marxist theory'.<sup>94</sup> Hence Marxism's analytical focus, not on individual objects or independent phenomena, but on networks of relations and circuits of processes, united in contradiction.

The notion that social reality actually consists of discrete levels is thus anathema to Marxism. The rejection of this notion is entailed in its commitment to materialism, which denies (and must deny) the ideal an autonomous existence. For Marx, as we know, 'the ideal is nothing else than the material world reflected by the human mind, and translated into forms of thought'.<sup>95</sup> In other words, the superstructure is an effect of the base and is not separable from it. The base and superstructure comprise a totality which cannot be decomposed into independent strata. They constitute an irreducible and indivisible singularity. Despite his sympathies for the reconstructionist project, Sayer explains the relationship between base and superstructure well:

'The "superstructure", in brief, is simply the "ideal" form in which the totality of "material" relations which make up the "base" itself are manifested to consciousness, not a substantially separable order of reality at all.'<sup>96</sup>

Such monism is the necessary concomitant of dialectical and historical materialism.

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94 Fűredi (1990: xi, original emphasis).

95 See footnote 26 above.

96 Sayer op cit 84.

However, it does not follow from the constitutional unity of social life that the distinction between base and superstructure is unsustainable, as Sayer suggests.<sup>97</sup> As we have seen, Marx did make the distinction in the *Preface* and he defended it in *Capital*. Indeed, he relied upon the concepts which he described in the *Preface* as his 'guiding principle' in all his subsequent work. In other words, despite his total commitment to the monist view of social reality, he did elaborate a conceptual framework which divided up that reality. This is not as contradictory as many reconstructionists who are averse to the 'guiding principle' suppose.<sup>98</sup>

### 1.13 The Process of Abstraction

The problem evaporates if one remembers that there is a difference between the object of analysis and the analysis of that object. The object of analysis confronts us as a chaotic empirical totality. It is an epistemological axiom that we can order and analyse such object only via a set of concepts designed to render it comprehensible.<sup>99</sup> Ollman makes the point forcefully:

'[A]ll thinking about reality begins by breaking it down into manageable parts. Reality may be in one piece when lived, but to be thought about and communicated it must be parceled out. Our minds can no more swallow the world whole at one sitting than can our stomachs. Everyone then, and not just Marx and Marxists, begins the task of trying to make sense of his or her surroundings by distinguishing certain features and focusing on and organizing them in ways deemed appropriate.'<sup>100</sup>

Each concept which we construct is necessarily an abstraction, not an obvious and direct attribute of the object, but presumably chosen on the

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97 Ibid 37.

98 These distinctions do not imply a return to Kantian dualism. Marxism recognizes that Hegel had settled with Kant. The distinctions drawn by Marx are analytical ones, to help illuminate the complex reality in its totality. In order to be able to analyse the whole it is methodologically necessary to identify its constituent elements and their interrelations. Herein lies the motivation for the different levels of determination identified in the *Preface*. They correspond to the actual workings of the organic social whole; they express the 'laws' which govern objective reality in all its contradictory complexity.

99 See Slaughter (1975: 25).

100 Ollman (1993: 24).

basis of a knowledge of the history and empirical contours of the object. Each such concept is also invariably partial, in that it is able to comprehend only a portion of the whole. In other words, conceptualization necessarily involves a process of 'pigeon-holing', in terms of which the analyst bifurcates social reality in an effort to comprehend it.<sup>101</sup> The conceptual framework contained in the *Preface* is nothing more nor less than such a 'pigeon-holing' exercise. Marx was obviously fully alive to the elemental singularity of social life. But he was just as obviously alive to the fact that social life could not be analysed scientifically in its fundamental oneness. And his identification of different levels of social life in the *Preface* is, in consequence, a rational methodological imperative and not, as the reconstructionists would have it, an index of some species of ontological errantry.<sup>102</sup>

The construction of any conceptual framework - not just a Marxist conceptual framework - always and necessarily involves the analyst in a process of abstraction.<sup>103</sup> It is not possible to theorize a concept or form without having recourse to abstraction, which Ollman defines as 'the intellectual activity of breaking [the] whole down into the mental units with which we think about it'.<sup>104</sup>

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101 See Mouton & Marais (1994: 58 and 126).

102 See Jakubowski (1990: 37).

103 See Marx op cit 19: 'In the analysis of economic forms, moreover, neither microscopes nor chemical reagents are of use. The force of abstraction must replace both.'

104 Ollman op cit 24. It is via the process of abstraction, involving the decomposition of the whole into its constituent elements in order to focus upon a particular element, that 'truth' in social analysis is pursued. However, every given social fact is, to begin with, already an abstraction. We encounter it for the first time in isolation, as an independent phenomenon, detached from its organic unity with the whole. The first step in the process of abstraction, therefore, is to relocate the given social fact into the social whole of which it forms a part. This means situating it in relation to the fundamental social process, namely, production. Simultaneously this means locating it in relation to the two sets of determinations identified above and deciding to which of the two it belongs. The next step is to abstract the given social fact again, to re-abstract it, from the social whole. It can then be the subject of close dialectical materialist analysis to show exactly how it relates to the whole. See Marx (1977a: 205ff).

The process of abstraction isolates and purifies the relations chosen for analysis, and reduces them 'to certain standard types, from which all characteristics irrelevant to the relation under examination are removed'.<sup>105</sup> In the *Preface*, Marx is concerned to communicate the core relations of social reality and social change.<sup>106</sup> Reconstructionists tend, incorrectly, to conflate Marx's focus on essentialia with an inattentiveness towards the complexities of the world. They misunderstand his deployment of the force of abstraction.<sup>107</sup> They forget that it is precisely in order to give coherence to 'our intuitive sense of the complexity of the social world',<sup>108</sup> that the essentialia of the relations comprising that world have to be identified, highlighted and analysed. 'Our intuitive sense of the complexity of the social world' has its material foundation in the dialectical character of that world.

#### 1.14 Abstraction versus Model-Building

The reconstructionists do not appreciate that the conceptual framework in the *Preface* operates at a high level of abstraction, to enable us to comprehend the fundamental dialectical relationships which comprise social reality without being sidetracked by non-essential considerations. That is why Marx called it and defended it as his 'guiding principle'. It holds the key - the dialectic of forces and relations of production - to discerning the inner logic of the process of development of the real world. Thus, Marx explains in the *Preface*:

'At a certain stage of development, the material productive forces of society come into conflict with the existing relations of production or - this merely expresses the same thing in legal terms - with the property relations within the framework of which they have operated hitherto. From forms of development of the productive forces these relations turn into their fetters. Then begins an era of social

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105 Sweezy (1942: 17).

106 See Sweezy *ibid* 14.

107 See Chapter Five below for more on Marx's use of abstraction.

108 Hunt *op cit* 209.

revolution. The changes in the economic foundation lead sooner or later to the transformation of the whole immense superstructure.'

For Marx, in other words, social change - conceived on the world-historical level - originates in the maturation of the contradictions which govern the relationship between the forces and the relations of production. Every mode of production develops to the point where the tendency of the forces of production to development is confronted by the tendency of the relations of production to inertia. The latter impedes the former. This historical impasse can be resolved only by 'an era of social revolution' which, in class society, is a historical period - sometimes condensed, sometimes protracted - of struggle between rulers and ruled about the continuation of the extant relations of production. The revolutionary era results in the transformation of the relations of production and, by operation of the materialist premise, of 'the whole immense superstructure'.

If we are to take seriously Marx's own characterization of the 1859 *Preface* as containing his 'guiding principle', we must also accept the conceptual framework which it outlines as central to the Marxist approach to historical and social analysis. The concepts of forces of production, relations of production and superstructure, and their interrelations, give methodological coherence to Marx's extension of philosophical materialism, in both its dialectical and historical aspects, to the analysis of the social world. The conceptual distinctions which Marx drew and the levels of determination which he identified in the *Preface*, therefore, must be considered as integral to his method.

It must be emphasized, however, that in the *Preface* Marx was providing us not with a model of social reality but with a methodological map to the analysis of social reality. The difference is crucial. Indeed, it is arguable that mere cognizance of this difference defeats, in large part, the reconstructionist assault

upon the supposed inadequacies of the *Preface*. For, it is precisely the ‘model-building interpretation of Marxism’,<sup>109</sup> in terms of which the social world is supposed to fit into Marx's 1859 ‘model’ of it, which is the prime target of the reconstructionists. It is the obvious non-correspondence between the complexities of the social world and Marx's supposedly simplistic ‘model’ of it which prompts them to question the validity of the ‘model’ and, ultimately, of dialectical materialism, the Marxist epistemology.

However, it is submitted that it is not the conceptual framework of *Preface* which is defective, but the reconstructionists' perception of it as constituting a model. They transform Marxism into a model-building project and then evaluate it as being unable to comprehend the intricacies and subtleties of our social existence. They need reminding that whereas model-building may well be germane to the method of bourgeois social philosophy, it is foreign to Marxism. They inflate the conceptual framework of the *Preface* beyond Marx's own description of it, and thereby invent problems which their reconstructions are intended to resolve. However, these problems cease to be if the *Preface* is taken for what Marx actually said he intended it to be, that is, his ‘guiding principle’, not a comprehensive model of the social world, but a methodological compass, and its concepts analytical signposts, for uncovering the laws of motion of that world.

### 1.15 Marxism and Determinism

It is time to resume the discussion of Marxism and economic determinism adverted to earlier in the chapter. The Marxist method, as outlined in the *Preface*, does entail a determinism. The determinations identified in the ‘guiding principle’ follow quite naturally and necessarily from the Marxist commitment to

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109 Fùredi op cit xii.

dialectical and historical materialism. Marxism is, in this connection, unequivocally deterministic. But it is a determinism which is informed by and derived from the recognition of the impact of being upon consciousness. It is an axiom of Marxism that being is constituted materialistically, in the social relations of production. Marxist determinism is thus simply an acknowledgement of the priority, in nature and social life, of matter over mind.

Many reconstructionists have problematized the deterministic dimension of Marxism. Some even consider it to be a major weakness, petrified under the weight of Stalinist orthodoxy, and have sought to develop a non-deterministic version of Marxism. It must, therefore, be stressed that, despite the sensibilities of the reconstructionists, Marxism does consciously embrace the 'spectre of determinism'.<sup>110</sup> It does teach us that reality has an objective existence independent of what we may think of it. And it does hold that historical

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110 Despite differing significantly on a number of issues, prominent 'Western Marxists' such as Gramsci, Althusser and Poulantzas all rely upon a notion of relative autonomy to distance themselves from the perceived economic crudities of the 'spectre of determinism'. See, for example, Gramsci (1971: 161-164, 366 & 407), Althusser (1969: 89-128) and Poulantzas (1978: 255-262). See also Cain (1983), Boggs (1976) and Merrington (1977) for commentary on Gramsci; Callinicos (1976), James (1985) and McLennan *et al* (1978) on Althusser; and Grabb (1990), Jessop (1982) and Wood (1986) on Poulantzas. Relative autonomy allocates to the superstructure a conditional independence from the base, allowing for determination by the base only in the last instance. It would appear that the relative autonomists want to have their cake and eat it. Their formal adherence to Marxist determinism is accompanied by theoretically sophisticated efforts to avoid its substance. Althusser's concept of overdetermination is exemplary here. It allows for a complex of reciprocal determinations between superstructure and base, and for superstructural elements, although never determinant, to be dominant, in the sense that the economic instance 'determines' that a non-economic instance 'dominates' the social formation in a given conjuncture. As will be seen below, classical Marxism readily accepts that there are superstructural aspects which cannot be attributed directly to the workings of the base, and that non-economic relations may have an impact upon the form of economic relations. But this is not the same as theorizing the superstructure as relatively autonomous from the base, especially if, as Althusser (*ibid*: 113) tells us, 'the lonely hour of the last instance never comes'. From this admission it is but a short step to absolute superstructural autonomy. Relative autonomy thus entails a sleight-of-hand in terms of which determination in the last instance or in the final analysis becomes a covert route to the abandonment of materialism in the comprehension of the superstructure and its relation to the base. Chapter Five below contains additional commentary upon the notion of relative autonomy.



development and social existence, like death, are rational processes which are governed by material necessity, regardless of our distaste for them.

However, Marxist determinism is not, by any means, an economic determinism, of the kind so often charged by anti-Marxists. In other words, the determinism of Marxism does not reduce social actors to hapless victims of structural economic processes over which they have no control. It is, instead, a determinism which endows social actors with a vital say in the constitution of society. In this regard, it is a determinism which is, firstly, materialist in that it bases itself, as Engels tells us, upon Marx's discovery of 'the law of development of human history', namely:

'the simple fact, hitherto concealed by an overgrowth of ideology, that mankind must first of all eat, drink, have shelter and clothing, before it can pursue politics, science, art, religion, etc'.<sup>111</sup>

Secondly, it is a determinism which is dialectical, giving full recognition to the effectivity of the non-material. It does not debase 'politics, science, art, religion, etc' to absolute dependence upon or total subservience to the so-called economic factor. Despite the allegations of its detractors, the determinism espoused by Marxism is a determinism which celebrates agency.

Fortunately, many perceptive analysts, including non-Marxists, do not take seriously the charge of economic determinism. They appreciate that historical materialism is 'not the crudely deterministic model which it has so often been taken to be'.<sup>112</sup> Such commentators understand that neither Marx nor Engels ever relied upon the kind of mechanical reductionism which has been attributed to them, falsely, and that both recognized fully the creative impact of human

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111 Engels (1978: 681).

112 Tosh (1991: 165).

productive activity upon the construction of social life.<sup>113</sup> The Marxist antipathy to economic determinism is made crystal clear in the opening paragraph of Engels's letter to Bloch:

‘According to the materialist conception of history, the ultimately determining element in history is the production and reproduction of material life. More than this neither Marx nor I have ever asserted. Hence if somebody twists this into saying that the economic element is the only determining one, he transforms that proposition into a meaningless, abstract, senseless phrase.’<sup>114</sup>

Again, as with Marx's defence of his ‘guiding principle’, it would be hard to find a more direct denial of the charge of economic determinism.

Plekhanov's distinction between dialectical materialists and economic materialists is enlightening here. Marxists are dialectical materialists, concerned with comprehending the materiality of the laws of motion of the social complexus. Economic materialists subscribe to the kind of economic determinism which ascribes all social and political developments directly to the operation of ‘the economic factor’. But, as Plekhanov demonstrates, economic determinism patently has no material foundation and in the end turns out to be ‘nothing but a variety of idealism’.<sup>115</sup> Dobb, also, makes clear that, despite initial similarities, there exists an analytical chasm between Marxism and economic determinism which is unbridgeable:

‘The Historical Materialism of Marx shares with the economic determinist an insistence that history is to be interpreted in terms of material events. In other words, it shares with the mechanists their materialism. But this statement Historical Materialism intends in a purely practical sense: namely, that knowledge of history is given solely in scientific study of historical experience, and not in intuition or in *a priori* knowledge. By this insistence that history is to be explained in material categories, the Marxist does not intend to erect an abstract separation of events into “material” and “ideal”, the

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113 See Slaughter (1985: 33) and Wood (1984: 63-4).

114 Letter to Bloch 21-22 September 1890 in Marx & Engels (1975: 394).

115 Plekhanov (1976: 8).

former playing an active, and the latter only a passive, role in historical causation: the formulation of the issue in such terms, into which the economic determinist so frequently falls, is for the Marxist entirely barren and unreal.’<sup>116</sup>

The vulgar economic determinist reading of the *Preface* is thus easily defeasible. The simple fact, to imitate Engels, is that there is nothing whatsoever in the Marxist worldview, properly comprehended, against which an allegation of economic determinism could be sustained.

### 1.16 Socio-economic Determinism

If the determinism of Marxism has to be labelled at all, it may perhaps be described usefully as a socio-economic determinism, as opposed to an economic, determinism. Mandel puts it thus:

‘Historical materialism in no way affirms that material production (“the economic factor”) directly and immediately determines the content and form of all so-called superstructural activities. Moreover, the social base is not simply productive activity as such, and even less is it “material production” taken in isolation. It is the social *relations* that people form in the production of their material life. In fact, historical materialism is not, therefore, economic determinism, but *socio-economic* determinism.’<sup>117</sup>

The point is that, contrary to the reconstructionist reading of the 1859 *Preface*, Marxism and economic determinism are incompatibles. The latter asserts a direct determination of the superstructure by the base and lapses easily into the compartmentalization of dualism. The former is committed to the monist conception of the world and postulates a dialectical relationship between base and superstructure. It ought to be evident that Marxist determinism and economic determinism occupy distinct and contrary epistemological terrains. Certainly, Marxism neither shares nor condones any of the rudenesses of economic

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<sup>116</sup> Dobb (1932: 14).

<sup>117</sup> Mandel op cit 175, original emphasis.

determinism. Instead, it is committed to the nuanced analytic of socio-economic determinism.

For Marxism, determinism means the unconditional acceptance of ‘the decisive primacy of the socio-economic level over juridical, political and cultural phenomena’.<sup>118</sup> It is indisputable that we are born into a definite economic structure. In other words, we inherit a determinate set of social relations of production. Certainly, we have no choice in the matter. And as we develop, we undergo a process of socialization in terms of which we acquire the social, political and moral values which correspond to the given relations of production and which facilitate the reproduction of those relations. Few thoughtful analysts can offer or would care to construct any sustained argument against this aspect of Marxism. Indeed, many are willing to accept and even defend the veracity of this Marxist postulate, and do not hesitate to incorporate it into their own work. Thus, for example, Sargent readily concedes, in relation to the determinism of Marxism, that:

‘The most basic point, which is a truism today, is that the way people think is greatly affected by the way they live. It would be very difficult to argue against this point.’<sup>119</sup>

In other words, the material aspect of our lives governs the subjective aspect, and the social relations of production establish the parameters within which our mental production occurs. In this Marxism is unequivocal: ‘it is social existence which determines social consciousness’.<sup>120</sup>

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118 Timpanaro op cit 40.

119 Sargent (1981: 85).

120 Mandel op cit 183.

### 1.17 Making History

But Marxism is equally unequivocal in the view that humans make their own history. We do not and cannot choose the matrix of material conditions in which we find ourselves and in which we have to act. But our practical activity constantly re-configures that matrix. It is the course of human living that ‘determines’ the course of human history. We are not mere objects of the economic structure. That structure comprises, importantly, a determinate set of social relations of production which humans inhabit and construct in the course of their productive interactions. The point is that although we have no say in the kind of economic structure into which we are born, we have a huge say in the development, changes and eventual destruction of that structure.

What is more, the superstructure does not simply emerge spontaneously out of the economic structure. It is created by humans, in their living in, with and against the economic structure. The latter prescribes only the limits human action. Mandel clarifies:

‘While it is of course true that humanity’s choices are predetermined by material and social constraints from which it cannot escape, it can forge its own destiny within the framework of these constraints. Humanity makes its own history. If humanity is the product of given material conditions, these material conditions are in turn the products of *human social practice*.’<sup>121</sup>

This is why the superstructural dimension of social reality can never be conceived as a direct or proximate reflection of the material base. Our consciousness can never be read off linearly from our social existence. Engels makes this point forcefully, if somewhat sardonically, in his letter to Bloch:

‘It is hardly possible, without making oneself ridiculous, to explain in terms of economics the existence of every small state in Germany, past and present, or the origin of the High German consonant shift, which widened the geographic partition formed by the mountain

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121 Ibid, original emphasis.

ranges, from the Sudetes to the Taunus, into a regular fissure running across Germany.’<sup>122</sup>

The relationship between the base and the superstructure is a dialectical one, expressed in the social practice of humankind. And the determination of the superstructure by the base is usually, if not invariably, a mediated determination, the crucial intervening factor being humans ‘making their own history’. Indeed, even the constitution of the economic structure is demarcated in terms of human activity. This is made clear by Engels in the following comment:

‘What we understand by the economic relations, which we regard as the determining basis of the history of society, is the manner and method by which men in a given society produce their means of subsistence and exchange the products among themselves.’<sup>123</sup>

If Marxism comprehends determinism as an epistemological necessity, then it comprehends praxis as the necessary conjugate of that determinism.

In this regard, it should be emphasized that Marxism does not entail either voluntarism, which would privilege human activity absolutely, or fatalism, which would denigrate such activity absolutely. It neither apotheosizes human activity, as the praxis theorists are wont to do, nor does it hypostatize the social system and its institutions, as is the tendency amongst structuralists. In other words, Marxism neither elevates humans to free subjects upon whom material conditions have no impact whatsoever, nor does it reduce humans to passive objects of external forces in the face of which they are powerless. Instead, it insists that, within the confines of a definite, historically specific set of material conditions, human social practice is fundamentally creative. That is, it propounds the view that humans do ‘make their own history, but they do not make it just as they please’.<sup>124</sup> Thus Engels writes to Borgius that:

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122 Letter to Bloch 21-22 September 1890 in Marx & Engels (1975: 395).

123 Letter to Borgius 25 January 1894 in Marx & Engels (1968: 693).

124 Marx (1977b: 10).

‘Political, legal, philosophical, religious, literary, artistic, etc., development is based on economic development. But all these react upon one another and also upon the economic basis. It is not that the economic situation is *cause, solely active*, whereas everything else is only passive effect. There is, rather, interaction on the basis of economic necessity, which *ultimately* always asserts itself.’<sup>125</sup>

Marxism considers human social practice to be dialectically related to the materiality of human social existence. The relationship between the two is necessarily an asymmetrical one.<sup>126</sup> For, whereas practice can and does influence the composition and development of social existence, it is always constrained by the material framework of that existence, and can never have effects which are not founded in that material framework. In other words, the unity of social practice and social existence is achieved in a relationship of contradiction, marked by the dominance of the latter over the former. We generally act the way we think, and in so acting we affect the way we live - but only because the way we think has been determined by the way we live. Our subjectivity is constituted objectively.

The determinism of Marxism is not, it must be reiterated, an economic determinism. It does not, as is so often alleged, rob us of our subjectivity and transform us into helpless victims of some kind of overwhelming *vis absoluta*. On the contrary, Marxist determinism allows us to explain the material basis of our subjectivity, and also that our feelings of helplessness have identifiable causes in objective reality. It arms us with the means to investigate social practices and historical developments systematically, without having to rely upon the vagaries of chance or the fancies of free will.<sup>127</sup> Provided we conceive of it as did Marx and Engels, and all the other great Marxists, that is, dialectically, the idea of determinism is neither disarming nor dehumanizing. Rather, it affords us

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125 Letter to Borgius op cit 694, original emphasis.

126 Symmetry entails fixity, which does not accord with the developmental tenor of dialectics.

127 See Lenin (1975: 198).

philosophical access to the defining feature of social reality, namely, that all social practice begins with human beings in definite and historically specific social relations of production.<sup>128</sup>

### 1.18 The Problem of Legality

At this point it is necessary to canvas an issue which has apparently caused a major problem for the materialist conception of history, especially as regards the classification of the legal form as a superstructural element. The problem, raised by critics such as Acton and Plamenatz, derives from Marx's lexical choices (emphasized below) in the following sentence from the 1859 *Preface*:

‘At a certain stage of development, the material productive forces of society come into conflict with the *existing relations of production* or - *this merely expresses the same thing in legal terms* - *with the property relations* within the framework of which they have operated hitherto.’

In this sentence Marx tells us, *inter alia*, that property relations express relations of production ‘in legal terms’. The argument of the critics is that here Marx, in effect, is making an admission which undermines any clear distinction between base and superstructure. For, if relations of production and property relations are, according to Marx, equivalents, then law is in fact an aspect of the economic structure of society. It is not a mere superstructural aspect. It is an attribute of the base. This conclusion follows from the fact that property is quintessentially a legal construct.

The critics press on, arguing that, in fact, social relations of production can be defined properly only in legal terms. Thus, for example, Plamenatz contends that:

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<sup>128</sup> Marxist determinism may perhaps be likened to a form of *vis compulsiva* which allows a margin of choice within a situation of necessity.



‘Unfortunately, it is quite impossible to define these relations [of production] except in terms of the claims which men make upon one another and recognize - except in terms of admitted rights and obligations.’<sup>129</sup>

Hence, if the relations of production are in fact legally constructed, Marx's distinction between the base and superstructure collapses, and so does the materialist conception of history. Cohen refers to this issue as the ‘problem of legality’,<sup>130</sup> and Hunt dubs it ‘the legal problem in Marx’.<sup>131</sup> Cohen poses ‘the problem’ as follows:

‘The problem: if the economic structure is constituted of *property* (or *ownership*) relations, how can it be distinct from the *legal* superstructure which it is supposed to explain?’<sup>132</sup>

According to the commentators, the ‘problem of legality’ implies that historical materialism is ‘viciously circular’:<sup>133</sup> it is unable consistently to separate the base from the superstructure and must, ultimately, ‘lapse into incoherence’.<sup>134</sup>

Cohen's solution to the problem is well known. He argues, contrary to Plamenatz, that it is indeed possible to define the relations of production in terms other than the legal ones of ‘admitted rights and obligations’. He constructs what he terms ‘*rechtsfrei* production relations’,<sup>135</sup> by ‘dropping the word “right” and replacing it by the word “power”’.<sup>136</sup> Despite appearances to the contrary, the change effected by Cohen is not simply a formal terminological one. The change is also an analytical-methodological one. For, he says:

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129 Plamenatz (1963: 281).

130 Cohen op cit 217.

131 Hunt op cit 183.

132 Cohen op cit 217-8, original emphasis.

133 Sayer op cit 50.

134 Collins op cit 77.

135 Cohen op cit 222.

136 Ibid 219.

‘Possession of powers does not entail possession of the rights they match, nor does possession of rights entail possession of the powers matching them.’<sup>137</sup>

In other words the lexical shift implies a substantive transformation from a *rechtsvoll* to a *rechtsfrei* conception of relations of production.

### 1.19 What Problem?

Whether or not Cohen has succeeded in solving the ‘problem of legality’ is moot. The matter need not be pursued further here, because there is, it is submitted, a prior issue which requires discussion, namely, whether or not the ‘problem of legality’ is a real problem for Marxism. Specifically, does Marx, in the *Preface*, define the relations of production in legal terms, as Cohen’s formulation of the problem implies? A number of reconstructionists, even though they do not share Cohen’s faith in ‘traditional historical materialism’, agree that ‘the legal problem in Marx’ does indeed exist. They accept that in the *Preface* Marx does in fact tell us that supposedly superstructural legal relations are at once also part and parcel of the economic structure of society, thereby calling into question the validity of the base-superstructure distinction which is so basic to ‘traditional historical materialism’.<sup>138</sup> And they have offered solutions to the problem of legality which, for the most part, amount to an abandonment of ‘traditional historical materialism’.

Unlike Cohen, who defends the base-superstructure distinction, the reconstructionists, as already noted, have moved, to a greater or lesser degree, towards conceiving the juridical itself as a relation of production or as constitutive of the relations of production. This approach to the ‘problem of legality’ derives

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137 Ibid 217.

138 See, for example, Hunt op cit 182ff, Collins op cit 77ff and Sayer op cit 50ff.

from the 'obviousness' of the impact of legal relations upon the economic structure of capitalist society. But, in taking it, the reconstructionists have virtually abolished the distinction between base and superstructure. In their efforts to meet the Acton-Plamenatz charge and to distance themselves from the official Stalinist conception of history, they have essentially repudiated a distinction which is crucial to the integrity of historical and dialectical materialism - and hence to Marxism.

It is submitted, however, that the 'problem of legality' is a spurious problem. Its existence has much more to do with justifying the reconstructionist project than with resolving supposed inconsistencies in the 'guiding principle' of the *Preface*. The answer to the question posed above must, then, be an emphatic no: Marx does not define production relations in terms of or with reference to legal relations. Even Plamenatz accepts this, when he writes that:

'He [Marx] also says that property relations are the legal expression of relations of production ... Why say of them [relations of production] that property relations are their legal expression, implying that they can be distinguished from them? Why not just call them property relations, and have done with it? ... Presumably because they [Marx and Engels] want to exclude law from what they call the economic structure of society, and therefore feel the need to suggest that relations of production can be defined without bringing the notion of law into the definition.'<sup>139</sup>

Here we have one of the supposed prime movers of 'the legal problem in Marx' telling us, expressly, that Marx does not equate relations of production with property relations and consciously avoids 'defining the relations of production by reference to legal rights and obligations'.<sup>140</sup>

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139 Plamenatz op cit 280-281.

140 Collins op cit 81.

The truth is that Plamenatz never actually alleges that Marxism is faced with a 'problem of legality'. What he, in fact, does is simply to declare, as we have seen, that 'it is quite impossible' to define the relations of production without reference to the law. Acton asserts similarly, if more broadly, that:

'The "material or economic basis" of society is not, therefore, something that can be clearly conceived, still less observed, apart from the legal, moral and political relationships of men.'<sup>141</sup>

The point is that both Acton and Plamenatz are opponents of Marx's materialist conception of history on which the base-superstructure distinction is founded.

They deny the primacy of the base over the superstructure and allege instead that the relations of production can only be identified and defined in terms of one or more elements of the superstructure. That, however, is very different from alleging that, in the *Preface*, Marx defines the relations of production in legal or proprietary terms. Inexplicably, none of the reconstructionists appears to have noticed this crucial difference. They all accept that the 'problem of legality' as formulated by Cohen does indeed exist and requires resolution. They, more than the Acton-Plamenatz school, have created the 'problem of legality' or, at least, have wrongly extrapolated it from the Acton-Plamenatz objections to dialectical and historical materialism.

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141 Cited in Cohen op cit 235.

## 1.20 Social Relations and Property Relations

Marx's own formulation of the matter in the *Preface* is unambiguous. In the seventh sentence of the excerpt he tells us that property relations express the relations of production in legal terms. This postulate can be transformed into the 'problem of legality' only by a truly sophist reading which employs the rules of formal logic, the method of reasoning which Marx expressly rejected.<sup>142</sup> The problem which the reconstructionists claim to have espied in the *Preface* emerges, literally, from one sentence. That sentence comes after five others in which Marx establishes explicitly that the superstructure derives from the social relations of production, and hence that legal relations need to be understood in relation to their material origins in the social relations of production. Thus, at the very beginning of the excerpt Marx comments that:

‘My inquiry led me to the conclusion that neither legal relations nor political forms could be comprehended whether by themselves or on the basis of a so-called general development of the human mind, but that on the contrary they originate in the material conditions of life.’

Between this comment and the offending sentence Marx makes crystal clear the relationship of determinism which materialism posits between being and consciousness, between the economic structure and the superstructure. It is therefore difficult to countenance, as the reconstructionists appear to do, that he should, whimsically and mysteriously, and in contradistinction to all that he has said before, suddenly decide that legal relations and production relations are ontological equivalents, that the relations of production are in fact property relations.

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<sup>142</sup> According to the principles of formal logic, it is indeed impossible for legal/property relations to be both superstructural and structural. The problem, however, evaporates if one reads the *Preface* as Marx wrote it, that is, dialectically.

It is noteworthy that the sentence in which Marx refers to property relations as the legal expression of the social relations of production is also the sentence in which he begins his explanation of the process of social revolution, that is, the transformation from one mode of production to another. Such transformation is a dialectical movement, proceeding from the unity and conflict of forces and relations of production. And it is entirely consistent with a dialectical comprehension of social transformation for Marx to advert not only to the economic structure but also to its legal expression, the property relations. For, these property relations invariably are or, if they are not, ought to be the prime target of the human agents of social revolution.

In class society people encounter the social relations of production most immediately in their juridical guise, as property relations, as differential proprietary relationships to the means of production. When Marx points to the superstructural copula of the relations of production as an alternative mode of comprehending the dialectic of social transformation, he is pointing to the form of the relations of production against which human social practice aimed at social revolution is necessarily directed. When he reminds us that property relations are the legal expression of the social relations of production, he is re-uniting form and content, pertinently foregrounding the fact that formal property relations have their material foundation in the social relations of production. In the *Preface*, Marx does not intrude the juridical into the relations of production and hence does not lead us into the conceptual quicksand of legal relations being simultaneously a component of the superstructure and the base. The 'problem of legality' is not a problem 'in Marx' but a problem in an epigonism which, ultimately, must repudiate the materialism of Marxism and itself 'lapse into incoherence'.

## 1.21 Marxism and Jurisprudence

Despite the many assaults, reconstructionist and reactionary, upon it, to this day the 1859 *Preface* stands as the best short exposition of the main tenets of the Marxist method of social investigation.<sup>143</sup> It contains all the conceptual guidelines required for a critical analysis of restorative justice as a theory of criminal justice. Restorative justice is an aspect of capitalist legality.<sup>144</sup> It is a jurisprudential intervention in the search for a solution to the capitalist crisis of criminality. As already noted, the fundamental premise of the Marxist approach to bourgeois jurisprudence is that capitalist legality is, essentially, the juridical expression of capitalist social relations of production.

The capitalist legal form is an element of the superstructure of the capitalist mode of production. It has its origins in and is determined by the social relations of production, in other words, its content is to be found in the economic structure of capitalism. Restorative justice is a legal superstructural form and must therefore be analysed as a conjugate of the legal relations of the capitalist mode of production. Marxism holds that capitalist relations of production summate in the struggle between the two major classes, the proletariat and the bourgeoisie. In other words, the content of the theory of restorative justice, as an aspect of bourgeois legality, is to be found in the ties of exploitation comprising the capital-labour relation.

In class, and hence also in capitalist society, law makes a crucial contribution to the systematic reproduction of the mode of production, by operating to protect and regulate the social relations of production.<sup>145</sup> In a word,

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143 See Timpanaro op cit 77-78.

144 It is posited in Chapter Six below that restorative justice is a postmodern theory of justice and, as such, a feature of specifically *late* capitalist legality. See Mandel (1975).

145 Certain proponents of restorative justice recognize this. Thus, Toews & Zehr (2003: 261) refer to 'laws being created to preserve' the extant social arrangements.

the general purpose of bourgeois legality is to protect the dictatorship of the bourgeoisie against attack, conscious or spontaneous, organized or random, from its class enemies, to guarantee the conditions of existence of capitalist private property.<sup>146</sup> Restorative justice is an aspect of this structure of class domination which the law reinforces, via the competencies of the state. Conventional punishment highlights the coercive competency of the state in respect of the individual criminal; ideological domination has a role only in the general deterrent value of such punishment. By contrast, restorative justice appears to focus much more on the consensual dimension of the law, aiming at an ideological hegemony backed up, in the final analysis, by the coercive power of the state.

However, generalities about the class content of legal relations and the role of the state in defending the class rule of the bourgeoisie, although true, do not suffice as a materialist explanation of restorative justice. Such generalities are applicable to the whole gamut of legal superstructural elements which we encounter in capitalist social formations. The Marxist analysis of restorative justice thus cannot be content with mapping the class basis of the legal superstructure. It also has to engage law as form. In particular, it has to explore the peculiarities of restorative justice as legal form.

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146 The work produced by Quinney and Chambliss in the 1970s and 1980s exemplifies the Marxist commitment to uncovering the class content of and the power configurations expressed in legal relations. Quinney's (2002) *Critique of Legal Order*, first published in 1974, and Chambliss's (1973) study of vagrancy law remain classics of this school of Marxist criminology. It is true that they are sometimes criticized for espousing instrumentalism. See, for example, Shelden (2002: xii) and Winfree & Abadinsky (2003: 254-256). However, insofar as they seek to comprehend legal relations materialistically and to discern the class interests and conflicts embedded in the legal system, they may be taken to be part of the classical tradition of Marxism. And while the charge of instrumentalism may be sustainable in respect of their early writings, it is not readily applicable to their writings of the 1980s. In this regard, see Quinney (1980: 46-47) and Chambliss & Seidman (1982: 144). The real weakness in their work is not their alleged instrumentalism (which, for classical Marxism, is not the repugnancy it is for Western Marxism) but their failure to engage the legal form as object of analysis.



A properly Marxist analysis needs to comprehend the class content of a legal form such as restorative justice. But it also needs to comprehend it *qua* form, that is, it needs engage the concept of restorative justice as a superstructural specificity. Restorative justice is a legal form of the social relations of production of capitalism. These relations, we know, are lived, for the most part, as the property regime of capitalism, that is, as commodified relations. From the Marxist perspective, the legal form is the homologue of the commodity form.<sup>147</sup> The Marxist interrogation of restorative justice as legal form must therefore commence with the commodity, as the pristine form of capitalist property.

Significantly, the core theoretical claim of restorative justice is a proprietary one. It seeks to re-define the criminal episode as the property of the offender and victim.<sup>148</sup> That is, it seeks to remove crimes from the public arena and to treat them instead as private disputes, owned and thereby falling to be resolved by the affected parties, as equals, according to a contract negotiated in a restorative conference.<sup>149</sup> Restorative justice thus commodifies the criminal incident and transforms offender and victim into commodity owners who relate to each other as equals. In other words, it campaigns for crime to be comprehended as a materialization of the commodity form. In this sense, restorative justice theorizes itself in explicit and unmediated relation to the social relations of production of the capitalist mode of production, as the material milieu of the commodity form. The analysis undertaken in the chapters below will thus, for the most part, simply be following the cue given by restorative justice itself.

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147 This relationship was originally postulated by Marx and Engels in various writings and later elaborated into the Marxist general theory of law by Pashukanis. See Chapter Five below for a full discussion.

148 See Christie (1977). The theory of restorative justice is analysed in detail in Chapter Four and Chapter Five below.

149 See Weitekamp (1999: 97) whose equation of the restorative sanction with a negotiated contract entails a proprietary precept.

## CHAPTER TWO

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## Chapter Two: Historical Perspectives

There is a strong strand of historicism running through the body of restorative justice. Its proponents invariably include in their validating manifesto an appeal to history. They argue that the concept has deep roots in the juridical past of humankind. They tell us that our pre-modern forebears created and embraced the principles of restorative justice, and that for them it was the normal way of doing justice. Punishment as we know it is considered a historically exceptional response to criminal conflict.<sup>1</sup> There are few restorationists who do not find comfort in the belief that our restorative intuitions are antediluvian, and may coincide with the formation of human society.<sup>2</sup> It is a belief which enjoys the status of a restorationist article of faith, more or less.<sup>3</sup>

The restorationist argument from history is well-illustrated in the reference by Van Ness & Strong to an 'ancient pattern' in Western law according to which:

'diverse cultures responded to what we now call crime by requiring offenders and their families to make amends to victims and their families - not simply to ensure that injured persons received compensation but also to restore community peace.'<sup>4</sup>

Mazrui makes a similar point in respect of the aboriginal African approach to the justice:

'In indigenous terms, the protection of the innocent was precisely the main focus of law enforcement, rather than the punishment of the guilty per se. Arising out of this came the victim-focus in law enforcement rather than the villain focus. When a crime was committed it was more fundamental to have the victim's family compensated than to have the villain or culprit punished.'<sup>5</sup>

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1 See Weitekamp (1999: 82).

2 Ibid 81.

3 For a dissenting view from within the restorationist ranks, see Daly (2002: 61-64).

4 Van Ness & Strong (1997: 8).

5 Mazrui (1986: 205). See also Van Ness & Strong *ibid* 9.

He goes on to suggest that the reason for the intractability of the crime problems plaguing contemporary Africa lies in that continent's failure to adopt the ideas and to make use of the methods of restorative justice in its attempts to resolve the problems:

‘What almost no African government is doing is returning to indigenous principles of norm fulfilment and methods of compensation and collective responsibility.’<sup>6</sup>

Weitekamp makes a direct connection between restorative justice and the practices of the premoderns:

‘In looking at the latest developments in restorative justice, one finds some of the newly implemented programmes are in fact very old, and that ancient forms of restorative justice have been used in acephalous societies and by early forms of human kind.’<sup>7</sup>

Restorative justice was born of dissatisfaction with the patent inability of the criminal justice system to resolve the contemporary crisis of criminality and represents a major challenge to the legitimacy of that system. It is at the same time, of course, concerned to establish its own legitimacy as a viable alternative. The restorationist project is, in fine, a campaign to replace criminal justice with restorative justice. It is a campaign which needs to be justified. Hence the appeal to history. Hence the claim to a historical pedigree which goes back well beyond the modern era.<sup>8</sup>

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6 Mazrui *ibid* 209.

7 Weitekamp *op cit* 93.

8 It is argued in Chapter Six below that restorative justice is a postmodern jurisprudence. Appeals to premodern ways are standard in the postmodern campaign against the supposed tyranny of modernism.

## 2.1 Restoration and Retribution

The historical argument for restorative justice is constructed, for the most part (and in true dialectical fashion), in opposition to the perceived domination of the retributionist paradigm in the modern approach to crime and punishment.<sup>9</sup> As intimated above, restorationists argue that our response to crime has not always been punitive, as it is today. They point out that punishment is but one of a number of possible ways which we have inherited of responding to offenders. History has also bequeathed us a range of non-punitive responses to criminal conduct. Hence, there is nothing either inevitable or necessary about the punishment paradigm. Certainly, it cannot claim historical priority over the restorative paradigm.<sup>10</sup> Zehr makes the argument thus:

‘The retributive model of justice is not the only way we have envisioned justice in the West. In fact, other models of justice have predominated throughout most of our history. Only within the past several centuries has the retributive paradigm come to monopolize our vision.’<sup>11</sup>

Wright takes the argument in favour of the restorative paradigm forward in much the same vein:

‘Crime and punishment are traditionally associated. Even definitions of crime generally include punishment: it is an act prohibited by law for which a duly convicted offender can be punished. But that has not always been the case. In other periods and cultures the response has been a restorative one: offenders make up for what they have done.’<sup>12</sup>

In other words, there has always been a miscellany of ways of doing justice, and the restorative paradigm has at least as much historical purchase as the punishment paradigm.

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9 Weitekamp (op cit 73 & 97) extends this opposition to rehabilitation.

10 The opposition between the punishment paradigm and the restorative paradigm is derived from Ashworth (1993: 280).

11 Zehr (1995: 87).

12 Wright (1991: 1).

From the restorationist viewpoint, then, retributionism does not enjoy a historical monopoly and is in fact a relative latecomer in the evolution of criminal justice. And it is a way of doing justice which is neither as natural nor as obvious as is often supposed. It is also not qualitatively superior to its competitors or predecessors. Its advocates argue that the restorative approach, in terms of which the response to criminal wrongdoing is geared towards mending the damage caused by the offender to the victim and the community, was once as jurisprudential and practical a commonplace as retributionism appears to be today. According to Wright:

‘Historical and anthropological reviews show that many simple societies function with little or no distinction between civil and criminal wrongs; indeed some do not have a system of law as understood in the complex societies of today, but rather a procedure for restoring the balance through reparation in individual cases where one citizen has harmed another.’<sup>13</sup>

Zehr describes the premodern version of the restorative approach as community justice, that is, a type of justice which:

‘recognized that harm had been done to people, that the people involved had to be central to a resolution, and that reparation of harm was critical’.<sup>14</sup>

In sum, then, its proponents submit that restorative justice is an integral, albeit neglected, aspect of our penal heritage, and can be traced back at least to a period of human history which predates the definition of crime as an offence against the state and which needs to be punished. They contend that the answer to the contemporary crisis of criminality begins with the recovery of our restorative proclivities.

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<sup>13</sup> Ibid 8-9.

<sup>14</sup> Zehr op cit 107. See also Van Ness & Strong (op cit 9) who submit that ‘the purpose of the [traditional] justice process was, through vindication and reparation, to restore a community that had been sundered by crime’.

The appeal to the restorative impulses of our ancestors is usually made, as intimated above, to counter the belief that humankind's aboriginal and natural response to injury or wrongdoing was vengeance. The restorationists hold that reparation as a response to wrongdoing has a history at least as long as vengeance. For them vengeance was not historically primary, but 'only one of a much richer set of options'<sup>15</sup> which included restoration. In other words, the notion that retribution forms the historical core of our penal jurisprudence is false. Our natural response to wrongdoing was not merely to take revenge but also to ensure the restoration of the *status quo ante*, that is, to require the offender and/or his kin to make good the harm caused by his conduct to the victim and the community.<sup>16</sup> Thus, restorative justice was, at minimum, an aspect of the original human penal impulse. It is neither new nor a radical postmodern creation. It has, at least, the same historical legitimacy as retribution, and if today we tend to think of retribution as the obvious response to crime, there is no reason why we should not, in the future, think of restorative justice in the same terms.

Such, briefly, is the argument for restorative justice from history. This chapter will attempt to evaluate this argument in terms of the precepts of historical materialism. It will analyse the history of the concept of restorative justice materialistically, relying upon the relevant concepts and methodological resources delineated in Chapter One. It is a Marxist axiom that material production determines mental production. There is always an objective basis, sometimes patent, often latent, to our thought products. The concepts which the human mind invents are invariably responses to historically specific material conditions. The analysis of concepts must therefore proceed from the material conditions in which they were created and elaborated. The aim of this chapter is thus to map the history of the concept of restorative justice in relation to this basic premise of historical materialism.

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15 Zehr *ibid* 98.

16 See Zehr *ibid* 106-107.

## 2.2 Marxism and Social Evolution

Marxist historiography is overtly evolutionist. It embraces a notion of social evolution, that is, the 'theory that society has passed through successive stages of development from lower to higher'.<sup>17</sup> Such evolution is, of course, materialistically comprehended, according to the historical development of the forces of production and the impact of such development upon the development of human culture and social life. In other words, Marxism accepts that the history of humankind displays a general progression from lower to higher stages of social organization, with each such stage corresponding to a definite mode of production.

As an analytical perspective, evolutionism does not enjoy much support outside of Marxist circles. It was very popular in the late 19<sup>th</sup> century. At that time, it was not a specifically Marxist approach. It was an integral aspect of the general intellectual milieu, 'a current of opinion that was almost universally accepted'.<sup>18</sup> Today, however, it is the object of near universal rejection. While pockets of evolutionary thought persist, it is anti-evolutionism which currently reigns supreme.<sup>19</sup> Certainly, evolutionism has little credence amongst legal anthropologists.<sup>20</sup> Their disaffection is founded upon the convictions, firstly, that history is not 'lawful' in the evolutionary sense and, secondly, that evolutionism is unable to comprehend the wide diversity of social organization which human

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17 Reed (1975: 466).

18 Bloch (1983: 63). See also Dugger & Sherman (2000: 3) and Sanderson (1992: 2). Sack & Aleck (1992: xvii) refer to evolutionism as 'this ideological linchpin of modern western civilization'.

19 See Sanderson *ibid* 209, Bloch *ibid*, Sack & Aleck *ibid* xix, Stein (1980: 124-127) and Barrett (1985: 16).

20 Thus, for example, Sack & Aleck (*ibid* xvii-xx) dismiss evolutionism as a species of positivism. It is accorded little, if any, space in anthologies on the anthropology of law. For example, the collections edited by Starr & Collier (1989), Sack & Aleck (1992) and Nader (1997) do not contain any pieces which are written from the evolutionary perspective or which are dedicated to analyzing or criticizing evolutionism. And the recent reader edited by Moore (2005) devotes perhaps 30 pages (of some 360) to brief extracts from works (of writers such as Maine, Morgan, Durkheim and Weber) which embrace an overtly evolutionary perspective.



beings have created. These arguments coalesce in the assertion that there is too much that is unique about individual societies to fit them all neatly into a general evolutionary scheme.<sup>21</sup> The cognate discipline of the sociology of law treats evolutionism with more or less the same short shrift.<sup>22</sup>

A brief response to these critics of evolutionism is necessary. The argument that there are no general laws of social development is undermined by the weight

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- 21 See Bloch *ibid* 63-64, Stein *ibid* 124, Leacock (1988: 12), Novack (1980: 35) and Friedman (1977: 42-45), Moore (2000: 82-133) concludes her extensive critique of Pound's legal evolutionary schema with the observation that his supposedly successive stages in fact 'can be found glued together' in pre-industrial societies. She also criticizes the schemes of Maine, Durkheim and Malinowski as being 'overfocused on particular elements', thereby using 'one aspect of a system to characterize the whole, which is a procedure of dubious worth'. Moore's arguments are refinements upon the basic anti-evolutionist position outlined above.
- 22 For example, Cotterrell (1984: 27) discusses evolutionism (after a fashion) but dismisses it in the following terms: 'Yet these evolutionary theories of breathtaking range and generalisation provide only the vaguest hints of the complex nature of social change ... Now, it is apparent that the variety of societies is such that evolutionary studies assuming broad uniform patterns of social development in all societies are at best simplistic (if suggestive), at worst grossly misleading.'
- The attention which Hunt (1978) devotes to evolutionism in his study of the sociological movement in law is largely expository of the work of Pound, Durkheim and Weber. In his conclusion, Hunt (*ibid*:141-142) does castigate bourgeois legal ideology for enlisting evolutionism in its argument for the necessity and naturalness of law in 'civilized' societies. However, even though he declares 'a strong commitment to Marxism' (*ibid* 9), he makes no commitment to the evolutionary perspective of classical Marxism.
- The developmental model of legal ordering posited by Nonet & Selznick (2001) does not follow the generalized anti-evolutionist tenor of the sociology of law. They conceive of their triadic typology of repressive, autonomous and responsive (or purposive) law in evolutionary terms. Thus, they tell us (*ibid* 18): 'We want to argue that repressive, autonomous and responsive law are not only distinct types of law but, in some sense, stages of evolution in the relation of law to the political and social order.' They continue (*ibid* 116): 'In conclusion, it may be helpful to restate the main point of the developmental model we have proposed, that is, the sense in which responsive law represents a "higher" stage of legal evolution than autonomous and repressive law.' However, as is evident from this last quotation, Nonet & Selznick subscribe to a model-building version of evolutionism. From a Marxist point of view, model-builders (even those who accept evolutionism) commit the cardinal methodological error of hypostatizing their model of reality. Marxism is not concerned with straitjacketing reality into an evolutionary model but with comprehending its evolution in its material and historical specificity. For the model-builder, fitting a phenomenon into an evolutionary stage forecloses investigation; for the Marxist it is the methodological beginning of investigation. In this regard, see Leacock *ibid* 14.

of empirical evidence to the contrary.<sup>23</sup> And the argument from historical particularism misses the point about evolutionism entirely. That point is to discern the directionality of social development on a world-historical scale. The fact that many societies do not fit easily into the general pattern of historical change proves only that evolutionism cannot be equated with or reduced to a 'simplistic unilinearism',<sup>24</sup> as the particularists are wont to do. It does not disprove evolutionism, nor does it present a serious challenge to the evolutionary record. There is, in this regard, some considerable substance in Sanderson's conclusion (derived from Lenski) that anti-evolutionists 'find no patterns in history because they don't want to find them'.<sup>25</sup> Certainly, classical Marxism is unequivocally evolutionist. Indeed, as Sanderson observes, 'Marx's theory of history makes no real sense except as a type of evolutionism'.<sup>26</sup>

It is well-known that Marx and Engels identified a sequence of five modes of production in the evolution of human society hitherto. These are the primitive communist, the Asiatic, the slave, the feudal and the capitalist modes of production. It must be stressed, however, that these modes of production are successive only in the world-historical sense, that is, they indicate the general development and overall direction of human society as a whole. The Marxist concept of social evolution has no relation whatsoever to the idea that each society has passed or must pass through each of the identified modes of

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23 Leacock (ibid 16-17) makes the point thus: 'Criticisms of evolutionary theory have characteristically emphasized the infinite variability of specific lifeways found around the world, each the historical end product of unique events and influences. Yet the accumulation of data has not merely documented diversity. Archaeological researches have yielded an undeniable picture of mankind's development from "savage" hunters to "barbarian" agriculturalists and finally to the "civilizations" of the Ancient East.' See also Novack (op cit 31-48) for a useful survey of the 'lawfulness' inherent in the record of social evolution. See further Sanderson (op cit 216-218) for more evidence of and arguments for evolutionary directionality.

24 Sanderson op cit 216.

25 Sanderson op cit 218.

26 Ibid 1.

production in strict order. Marxism eschews such crass linearity and crude teleology. The modes of production are sequential only in the sense that each, wherever and whenever it may have developed first, represented an advance upon its predecessor in the global development of human society.<sup>27</sup>

Historians conventionally divide the human record into two great sections, namely, prehistory and history, separated by the art of writing.<sup>28</sup> In the Marxist canon, primitive communism is a prehistoric mode of production, while the others are historical modes. In their analysis of primitive communism, Marx and Engels relied heavily upon the social evolutionary thesis formulated by the American anthropologist, Lewis Henry Morgan in his *Ancient Society*, first published in 1877. This work formed the basis of Engels's own *The Origin of the Family, Private Property and the State*.<sup>29</sup>

Morgan postulated that human society has developed through three world-historical epochs or 'ethnical periods', each identified by a specific 'art of subsistence'. He designated these epochs savagery, barbarism and civilization.<sup>30</sup> The savage 'art of subsistence' was food gathering.<sup>31</sup> For barbarism it was food

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27 See Childe (1947: 10-11).

28 See Daniel (1964: 10).

29 Marx took extensive notes from *Ancient Society*, and Engels used these to write a Marxist treatment of Morgan's findings in *The Origin of the Family, Private Property and the State*. See Engels (1940: 3) who, while accepting the fundamentals of Morgan's scheme, notes that the 'treatment of the economic aspects, which in Morgan's book was sufficient for his purpose but quite inadequate for mine, has been done afresh by myself'.

30 See Morgan (1912: 3-28).

31 Engels (op cit 25) describes savagery as 'the period in which man's appropriation of products in their natural state predominates'. See also Childe (1944: 12) and Mandel (1979: 18).

production.<sup>32</sup> Civilization is marked by the steady development of the forces of production, from agriculture through manufacture to industry.<sup>33</sup> It summates in capitalism, which has generalized commodity production as its 'art of subsistence'. Savagery and barbarism constitute the prehistory of humankind, civilization its history.

Marxism adopted Morganism substantially.<sup>34</sup> There are, of course, important differences. Marx and Engels subsumed Morgan's first two 'ethnical periods', savagery and barbarism, under the prehistoric primitive communist mode of production. They divided his third 'ethnical period', civilization, into four historical modes of production. They also went beyond Morgan by supplementing the formal-technical distinction between prehistory and history with a substantive socio-economic criterion of class and its concomitant, class struggle. The historical materialist postulate in this regard is that human prehistory is marked by the absence of social classes and hence is free of class struggle, whereas the historical period is dominated by the constant struggle between antagonistic social classes. Prehistoric societies are classless and communist; historical societies are rent by class divisions and endemic social inequality. The difference is fundamental and derives, in materialist terms, from the different 'art of subsistence' or level of development of the forces of production which characterized each 'ethnical period' or mode of production.

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32 Barbarism was a transitional epoch between savagery and civilization. It was marked by the Neolithic revolution, that is, the historic passage from food gathering to food production. Engels (ibid) refers to barbarism as 'the period during which man learns to breed domestic animals and to practice agriculture, and acquires methods of increasing the supply of natural products by human agency'. Our barbarian forebears thus took a giant leap which advanced human social evolution prodigiously. They were the heralds of civilization.

33 Engels (ibid) describes civilization as the epoch 'in which man learns a more advanced application of work to the products of nature, the period of industry proper and of art'.

34 Terray (1972: 66) considers that 'Morgan's arts of subsistence are, in fact, no different from Marx's productive forces; the ethnic period is the mode of production together with the juridical and political superstructures it has called forth'.

### 2.3 Savagery and Primitive Communism

The aboriginal savage unit of human social organization was the primal horde.<sup>35</sup> During this stage of our evolution (by far the longest) we had no or very little control over the natural environment and life was a constant battle to wrest from nature the requirements of our survival. Individual survival depended entirely upon social or group survival.<sup>36</sup> In other words, the imperatives of survival imposed upon early humankind a social organization which was communal and collective, marked by the most complete equality possible.<sup>37</sup> Sociality and equality were thus the presuppositions of savagery. Our savage predecessors were perforce also communards.

In the epoch of savagery the primal horde was elemental and total. There were no families. There were no classes. This is the era of unadulterated primitive communism. Social relations were founded upon the principle of literal equality. Social life was devoted to one goal only, the collective survival of the horde, against nature and rival hordes. The only division of labour was that between the sexes. In the material conditions of savagery, this meant that everyone (bar the very young and the very old and infirm) had to participate in the collection of the means of subsistence, which then had to be shared amongst all members.<sup>38</sup> There was enough to feed everyone, but no surplus which could privilege some members of the horde materially at the expense of others.

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- 35 Reed op cit 197. Manfred (1972: 12) refers to it as the primitive herd. It spanned most of the 450 or so millennia which constituted the archaeological Palaeolithic or Old Stone Age.
- 36 See Manfred *ibid*: 'During that distant epoch man found his sustenance mainly by gathering whatever food nature happened to provide, such as fruits and berries, and by hunting small animals. Since people at that time were to a large extent helpless before the forces of nature, they were obliged to live, work and defend themselves in groups.'
- 37 See Manfred *ibid*: 'These primitive herds were completely lacking in any concept of hierarchy or inequality.'
- 38 See Newman (1983: 142).

The primal horde was a complete social entity in and unto itself, autonomous and self-sufficient, which related to other hordes only in competition in the primal quest of food and shelter.<sup>39</sup> But in its internal relations it was necessarily fully egalitarian. Communism was a condition imposed upon our savage ancestors by the material conditions of their existence. It could not occur to any member to lord it over his fellows. The relentlessness of the communal battle against the forces of nature precluded the very idea of any individualist battle against the equality postulate. Savages had no choice but to be communards also.

Savage society was not only classless. It was also propertyless. According to Seagle, 'it is fair to assume an aboriginal state of non-property'.<sup>40</sup> In other words, as the aboriginal epoch of human society, savagery had no or little notion of property as we know it. There was, no doubt, recognition of personal property such as clothing, body ornaments, weapons and the like.<sup>41</sup> But such personal property, given its peculiar relationship to its 'owner',<sup>42</sup> could not undermine the communist nature of social relations. Seagle puts the matter cogently:

'Communism does not imply that no exclusive possession of objects of personal use can be recognized, nor that there are no individual rights and obligations in a communist society. In the nature of things, there can be little or no communal interest in a loin-cloth. A man's spear is no more than an extension of his hand and he would no more think of parting with one than with the other.'<sup>43</sup>

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39 See Reed op cit 197.

40 Seagle (1946: 51).

41 See Lafargue (1975: 10-11) and Seagle *ibid* 50-51. Both these writers note that the personal 'property' of primitive people is so intensely personal, that it becomes 'incorporated with the person' or is 'hardly more than an extension of the person'. Such objects of personal use are inalienable. They live and die with the person, being destroyed or buried with the 'owner' on death.

42 See previous footnote.

43 Seagle op cit 53.

The point is that humans in the epoch of savagery, given their 'art of subsistence', could not conceive of property in their most important means of production, the land. As hunters and gatherers their interest was in 'the yield of the land - its game, trees, fruit, grains - rather than in the land itself'.<sup>44</sup> Their relation to the land was entirely natural and hence non-proprietary.

Savagery was also stateless.<sup>45</sup> The state is a specifically historical phenomenon which emerged as a product of the division of society into classes. In prehistoric times, whatever public authority existed was communal, and generally exercised by all adult men and women of the horde. In other words, the public authority was properly public, coincidental with the social unit as a whole. The state is the negation of such collective jurisdiction. Its emergence removes public authority from the collectivity to:

'a special category of people set apart to rule others and who, for the sake and purpose of rule, systematically and permanently have at their disposal a certain apparatus of coercion, an apparatus of violence'.<sup>46</sup>

Such 'privatization' of the public authority was foreign to savage society. It knew only the complete democracy of the community, in which there was literally no place for state structures. There was only the horde, and it was the only public authority.

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44 Ibid.

45 See Hindess & Hirst (1975: 22).

46 Lenin (1984: 9).

Statelessness entailed lawlessness.<sup>47</sup> There was no law, there were no courts, there was no notion of justice dispensed by a specialized juridical apparatus. Savage society was governed by custom and convention, not law. The 'legal relations' of savagery are customary relations. Thus Seagle notes that:

'The great reality of primitive society is not "civil" law, or "criminal" law, but custom.'<sup>48</sup>

The absence of law from the prehistoric world is not the fabricated result of a definitional choice.<sup>49</sup> The designation of the savage epoch as lawless is not a sophistry. Law and custom are contraries, historically and logically. Law is symptomatic of state power, whereas custom signifies the absence of such power. Custom is, essentially, non-legal,<sup>50</sup> and law non-customary. In the epoch of savagery, then, 'custom is king'.<sup>51</sup>

Prehistoric lawlessness meant that savage peoples had no conception of lawbreaking conflicts. In the absence of legal institutions, injuries inflicted by one member of the prehistoric commune upon another could not be construed as crimes. There was no such thing as criminal harm by one communard against another. Vermes concludes:

'Therefore under the conditions of the primitive community there was no question of either crime or criminal offences, for both notions presuppose legal regulation, which in the absence of a state was non-existent.'<sup>52</sup>

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47 Lawlessness here means the non-existence of the legal form. It does not refer to a generalized collapse of 'law and order'. Even less does it signify an intellectual incapacity for legal rationality amongst savages. Savagery was lawless simply because the material conditions for the emergence of law did not exist. It is, of course, arguable that human relations in savage society were qualitatively richer than in our civilized society precisely because they were free of the legal form.

48 Seagle op cit 33.

49 The idea of savage lawlessness is also not an instance of contemporary legal ethnocentrism, as suggested by Spradley & McCurdy (1975: 386-387).

50 See Diamond (1987: 257). The idea of 'customary law' is thus a contradiction in terms, and demonstrates a signal ignorance of the evolution of both custom and law.

51 Seagle op cit 27.

52 Vermes (1978: 46).



Savage society was thus crime-free, at least in the sense that we understand the concept of crime. Certainly, there were interpersonal conflicts in the commune. Certainly, there was conduct which we would today classify as criminal. But savage society had no crime because it had no law. We shall return to this question later.

## 2.4 Barbarism and the Rise of Gentile Society

The gens or clan was the basic unit of social life under barbarism.<sup>53</sup> The gens was constituted by a combination of a number of hordes. Unlike its predecessor, which existed always in a state of isolation, the clan had links with other clans via membership of a common tribe.<sup>54</sup> Clan society retained the fundamental communist character of the horde. As with the primal horde, the members of the gens were communards, one and all. They, too, lived and died by the principle of perfect equality in all things. Thus Moret & Davy observe that:

‘When the horde becomes a social segment instead of being an entire society, it changes its name and is called the clan, but it preserves all its constituent features.’<sup>55</sup>

Clan or gentile society was thus the fundament of the primal horde evolved to a higher level of social organization.

Barbarism was exemplified by the Neolithic or food-producing revolution, which Mandel describes as ‘the greatest economic revolution in humanity's existence’ because it involved a qualitative leap in the development the forces of production, which enabled humanity ‘to control more or less its own subsistence’

53 The primal horde began to disintegrate during the Upper Palaeolithic age and was replaced, during the Mesolithic and Lower Neolithic periods, by the gens.

54 See Reed op cit 197-198.

55 Cited in Reed op cit 197.

and which 'permitted the building up of food reserves'.<sup>56</sup> The emergence of class divisions was entrained in the production of a permanent surplus. However, this remained a potentiality for most of the epoch, as the battle for survival remained predominant, and surpluses were generally stored to ensure the availability of sufficient food between harvests.

Barbarism thus retained the essentialia of the social organization of savagery for most of its existence. In other words, our barbarian ancestors, like their savage predecessors, were communards also. Only in the last phase of barbarism, in the period from about 4000 BC to 3000 BC, do we see the beginnings of the break-up of the gentile constitution and the germs of the institutions and relations which would become characteristic of the epoch of civilization, namely, class inequality, rooted in appropriation of the social surplus by an unproductive class, and institutionalized in state and law.

Conceptions of property developed very slowly in the human mind<sup>57</sup> and it took an event of the magnitude of the Neolithic revolution to initiate the demise of the aboriginal 'non-property' regime of the epoch of savagery. Only in the period of barbarism, with its pastoral and agricultural 'arts of subsistence', did the idea of property in land become a possibility. For, unlike its food-collecting antecedent which is essentially nomadic, a food-producing society requires, at least, an established terrain and a settled population. The birth of property (in its original landed version) was contingent upon this transformation in the material conditions of human existence. As Seagle tells us, there was:

'no particular reason for the appropriation of the land until dwellings and crops had become permanent'.<sup>58</sup>

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56 Mandel op cit 18-19.

57 See Lafargue op cit 18 and Seagle op cit 55.

58 Seagle ibid 53.

In other words, humans could only begin to conceive of a proprietary regime in land once the productive forces had been revolutionized. This occurred during the Neolithic revolution.

Gentile society was organized around the village commune, based upon landed clan property. However, clan property was collective property. There was no settled notion of private property. The territory occupied by the clan was owned and worked in common. The village commune was 'based on the absence of private property in land'.<sup>59</sup> Both gentile production and consumption continued along the path established during savagery, to remain essentially communal:

'[A]part from personal articles which were regarded more as parts of one's body than as individual wealth, all land and property were held in common and utilized for the benefit of all the members of the clan.'<sup>60</sup>

Only when gentile society was in the process of disintegration did the notion of private property begin to insinuate itself into the heart of human social relations.

Like its savage predecessor, barbarian society too was stateless. Engels tells us that the state is the antithesis of the 'gentile constitution'. The latter:

'had grown out of a society which knew no internal contradictions, and it was only adapted to such a society. It possessed no means of coercion except public opinion.'<sup>61</sup>

In other words, in barbarian society the clan was the public authority. There was no power above or authority separate from the clan. There was no specialized apparatus of political control. There was thus no state and, consequently, there was no law. The values and traditions of savagery survived intact into the epoch

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59 Mandel op cit 15.

60 Reed op cit 159.

61 Engels op cit 192.

of barbarism, and continued to inform the fundamental structures upon which barbarian society was based. Custom continued as king also in barbarian society.

## 2.5 Civilization and the Rise of Class Society

In its main lines, then, the prehistory of humanity - savagery and barbarism - comprised close to 500 000 years of primitive communism, free of classes, the state and law, and during which social existence was governed by the principle of equality in all things. Our 5000 or so years of history, which coincide with Morgan's third 'ethnical period' of civilization, is, so to speak, another story altogether. If, as Mandel has stated, the era of barbarism witnessed 'the greatest economic revolution in humanity's existence', then civilization may be said to have initiated 'the greatest social revolution in humanity's existence' thus far. For the transition to civilization was founded upon the defeat of the primitive communism of the prehistoric era, and the birth of social classes and class struggle.

This is the context of the famous aphorism with which *The Communist Manifesto* opens.<sup>62</sup> It refers to a social revolution which had its material roots in the vast increase in human productive capacity initiated by the Neolithic revolution and brought to fruition, in the civilized era, by the creation of large and permanent surpluses.<sup>63</sup> Reed explains the significance of these surpluses:

'At first these surpluses were used to sustain the village elders who coordinated work on community projects such as irrigation systems. But gradually some men elevated themselves into priest-kings, nobles, and overlords, standing above the common people, exacting foodstuffs, livestock and handicrafts as tribute and later as taxes.

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62 Marx & Engels (1967: 79): 'The history of all hitherto existing society is the history of class struggles.'

63 See Mandel op cit 19 and Novack (1980: 44-45).

Private wealth was now accumulating in the hands of an elite, a ruling class.’<sup>64</sup>

In other words, the surplus food and goods which had freed humankind from its subservience to the forces of nature led, over time, to the subservience of one section of humankind to another. That is the social mark of civilization, the division of human beings into two great classes - one which produces, and one which does not produce but owns the means of production and appropriates the social surplus product - tied to each other in a relation of structural contradiction, and living out this relation in class struggle.

Civilization thus introduces social inequality into human society, based on a qualitative change in the nature of production. Before the advent of civilization, production was geared ‘in its totality to fulfil the needs of the producers’.<sup>65</sup> Production in the civilized epoch is bifurcated into the socially necessary product and social surplus product. The former refers to the means of subsistence required to ensure the reproduction of the class of direct producers. The latter is surplus production which is appropriated by the class of non-producers and applied to its own subsistence and to wealth creation. This latter pursuit leads, over time, to the transition from production for use to production for exchange. In other words, civilization is coincident with the development of commodity production, including that ‘commodity of commodities’, money.<sup>66</sup> Engels summed up the economic foundation of civilization as:

‘the stage of development in society at which the division of labour, the exchange between individuals arising from it, and the commodity production which combines them both, come to their full growth and revolutionise the whole of previous society.’<sup>67</sup>

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64 Reed op cit 412.

65 Mandel op cit 20.

66 Engels op cit 189.

67 Ibid 198-199.

Civilization brought with it, literally, a brand new and truly revolutionary world, which laid waste all the presuppositions of the past.

## 2.6 Property, State and Law

One of the most revolutionary innovations of civilization was the institution of private property. The epoch of civilization is, above all, the epoch of private property. The growth of private property was a direct result of the break-up of kin-based gentile society and the concomitant emergence of class society. Primitive communism had to be destroyed in order for private property to develop. The communard had to perish in order for the proprietor to be born.

Private property, especially in the means of production, is the necessary copula of the division of society into antagonistic classes of producers and non-producers. In a word, class society and private property are logically coincident. The first forms of private property were movables, including the instruments of production, and slaves. It is one of the grandest ironies of history that civilization, as Novack reminds us, 'was ushered in and raised on direct slavery.'<sup>68</sup> The reach of private property was in due course extended to land, to complete its conquest of the means of production and its installation as the proprietary institution characteristic of class society.

The other institution which is peculiar to class society, and hence civilization, is the state. As pointed out earlier, prehistoric society was not only classless, it was also stateless. The state is a specifically historical phenomenon which emerges as a product of the division of society into classes. It is a characteristic trait of the civilized epoch and an index of the ruination of primitive classlessness. It will be recalled that Engels referred to the state as the antithesis

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68 Novack op cit 45.

of the gentile constitution of the barbarian epoch. He added that with the coming of civilization:

‘The gentile constitution was finished. It had been shattered by the division of labour and its result, the cleavage of society into classes. It was replaced by the state.’<sup>69</sup>

Class society has need of a mechanism which operates to maintain and perpetuate the social inequality which defines the relations between exploiters and exploited. The state fulfils this role. Engels again:

‘The state ... has not existed from all eternity. There have been societies which have managed without it, which had no notion of the state or state power. At a definite stage of economic development, which necessarily involved the cleavage of society into classes, the state became a necessity because of this cleavage.’<sup>70</sup>

The state was thus called into being to guarantee the reproduction of the social relations of production which structure the domination by the minority ruling class of the masses constituting the productive class. It exists to defend the existence of class privilege. It is, as Lenin so trenchantly expressed it, ‘a machine for maintaining the rule of one class over another’.<sup>71</sup>

Whereas savagery and barbarism were lawless, civilization was the first lawful epoch of human history. The emergence of the state entailed the ‘demise’ of the lawlessness of the prehistoric epochs. Law is an attribute of the state, and hence of class rule. Civilization abhors custom. It requires law. It requires an institution, of its own creation, which is able to weld together the various organs of the state, to legitimize state violence, to guarantee the sanctity of private property and to demarcate the province of each ideological state apparatus. Law

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69 Engels op cit 193.

70 Ibid 198.

71 Lenin op cit 13.

is that institution. If the armed forces are the right hand of the state, then law is its left.<sup>72</sup>

Civilization thus gave us social classes, private property and the state. It also gave us law. Civilization is an era of social evolution which emerged in opposition to the institutions and ethos of prehistory. Its birth required the death of almost half a million years of social collectivism. The achievements of the epoch of civilization were possible only on the basis of the destruction of the primitive communes and the subjugation of the communards. History is, in this regard, the negation of the communism of our prehistoric ancestors. It is the record of class dictatorship and class struggle about the parameters of such dictatorship. It is in this context that I propose to analyse the historical claims of the proponents of restorative justice.

## 2.7 The Maine Thesis

These claims rely squarely upon an assertion by Sir Henry Maine in his *Ancient Law*, to the effect that conduct which today we would classify as criminal was dealt with as delictual conflict by our prehistoric forebears:

‘If therefore the criterion of a delict, wrong, or tort be that the person who suffers it, and not the State, is conceived to be wronged, then it may be asserted that in the infancy of jurisprudence the citizen depends for protection against violence or fraud not on the Law of Crime but on the Law of Tort.’<sup>73</sup>

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72 Of course, the legal form as we know it did not emerge fully-grown. Like every other social phenomenon, it had to go through a process of evolution from infancy to adulthood. The earlier periods of civilization, spanning the pre-capitalist modes of production, had legal relations in their embryonic and developing stages. The legal form reaches maturity in the capitalist era, which is the highest stage of class society and hence of civilization. This is the era of complete fit between social and legal evolution in that the bourgeoisie, the ruling class in capitalist society, adheres to a worldview which is definitively juridical. See Chapter Five below for further discussion of this issue.

73 Maine (1906: 380-381).



In other words, Maine proposes that prehistoric 'crime' was dealt with as a private or civil matter, in which the state had no role and which was resolved by an award of 'delictual' damages to the victim.

His thesis has attracted consistent support over the years, especially from legal anthropologists. Thus Mair holds that, in primitive society:

'the principle which covers the majority of breaches of rule is that it is the injured individual who matters, and that what is important is for him to be compensated.'<sup>74</sup>

And Beattie concludes that:

'Where there is no centralized authority, and specialized political and judicial offices are lacking, most wrongs have to be treated as private delicts and dealt with by the injured party without reference to a higher authority.'<sup>75</sup>

The consensus, it would seem, is that prehistoric injuries were private delicts governed by the institution of composition. The harm suffered had to be repaired, by way of a solatium of sorts.

This anthropological conception of 'crime-as-delict' is, obviously, grist to the mill of the proponents of restorative justice. Although they do not acknowledge it, their historical arguments against retributionism are based upon the Maine thesis, as embraced and elaborated by those who followed him. They are convinced that restorative justice has deep roots in the history of humankind,

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74 Mair (1972: 148).

75 Beattie (1966: 174). See also Peristiany (1963: 43): 'What characterizes most of the actions which come up for settlement, even those arising from homicide, is that they are introduced by a private person in defence of sectional interests and that they claim restitution or private damages and not social retribution. In our idiom, most actions in societies of this type would come under civil rather than criminal wrongs.' See further Lewis (1994: 341-342): 'On the whole ... attacks on property and persons in uncentralized societies tend to be treated as wrongs, demanding reparation (if necessary in kind), rather than as crimes demanding punishment.' See also Radcliffe-Brown (1952: 212-219) who posits that in preliterate societies, crimes were treated according to the 'law of private delicts' which corresponds to the 'civil law of modern times'.

and that our response to crime was not always or only a punitive one. The Maine thesis goes far to confirm this conviction and, for that reason, needs to be examined critically.

## 2.8 The Public and the Private

A crucial dimension of the Maine thesis is the assertion of a prehistoric juridical distinction between the public and the private. It is this distinction which enables Maine to posit that conduct which today would be classified as a public crime would in prehistoric times have been understood and dealt with as a private delict. In a word, our ancestors conceptualized 'crime' in private terms, as a conflict between the offender and victim, to be resolved by them, without recourse to any public authority. As we shall see, the 're-privatization' of the criminal episode is an epistemological premise of the contemporary theory of restorative justice, as formulated by Nils Christie.<sup>76</sup> There is, thus, a discernible theoretical affinity between Maine and Christie in this regard.

However, a prehistoric legal dichotomy between the public and the private did not exist. As we have seen, the 'great reality' of prehistoric society is custom, in relation to which the public-private divide is a non-issue. Custom is totalizing and indivisible. It is the 'sway of custom',<sup>77</sup> not the distinction between the public and the private which is characteristic of prehistoric society. In prehistoric conflicts, then, the issue is not whether they are public or private, crimes or delicts. The only issue is whether or not there has occurred an infraction of a customary norm.

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76 See Chapter Four below.

77 Seagle op cit 33.

The public-private distinction is a patently modern invention. Although notions of the distinction go back to the early days of the existence of law and state, its coherent formulation can be traced directly to the birth and development of the capitalist mode of production. The elemental economic unit of capitalism is the commodity; its elemental juridical unit is the legal subject, the autonomous individual who, theoretically, is free to transact with any other autonomous individual by way of that most ubiquitous of legal bonds, the contract.<sup>78</sup>

‘The attempt to segregate private law is thus an attempt to establish the autonomy of the individual will, to create a private preserve for the individual, to guarantee the unfettered activity of juristic persons in the market. Private law is thus only another form of the triumph of freedom of contract.’<sup>79</sup>

The legal subject is the juristic *alter ego* of the commodity, and freedom of contract the legal foundation of the capitalist market. It is generally accepted that Maine was a prime proponent of the idea of the freedom and sanctity of contract, a conviction which he expressed so pithily in his famous epigram that ‘the movement of the progressive societies has hitherto been a movement *from Status to Contract*’.<sup>80</sup> As Seagle puts it, with the birth of capitalism and the triumph of the commodity form, ‘there was no god but Contract, and Sir Henry Maine was its prophet’.<sup>81</sup>

Maine’s thesis on the prehistoric conception of ‘crime’ must therefore be read in the context of his role as the ‘prophet of Contract’ and hence of his commitment to the autonomy of the individual. His messianic attachment to the mission of Contract resulted in his ignoring the essentially communal nature of

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78 This proposition is derived from Pashukanis (1978) and is discussed fully in Chapter Five below.

79 Seagle op cit 267.

80 Maine op cit 174, original emphasis.

81 Seagle op cit 266.

prehistoric social organization and discerning in its stead a primitive individualism, at least as regards the conception of wrongs. In other words, what the Maine thesis does is to elevate a historically specific condition of social life into a permanent feature of human nature. Prehistoric society is thus seen to be governed, juridically at least, by an individualism not dissimilar to that which dominates the structure of contemporary life. The bourgeois class sensibilities of the writer-prophet are insinuated into the life circumstances of his prehistoric communist ancestors.

Of course, the anthropologists who have adopted the Maine thesis are fully aware of the communalism which structured prehistoric social relations. Yet, they have endorsed Maine's 'private law' conception of prehistoric crime. And it is not a case of merely making use, for the sake of clarity and convenience, of current terminology to explain what our ancestors did in dealing with the problems and conflicts they encountered.<sup>82</sup> Rather, those anthropologists who adhere to the Maine thesis adhere also to the notion that the prehistoric individual is, in essence, identical to the contemporary one, and hence that there existed in prehistoric society a sphere of the juridical private which was founded upon the individual as the 'private prosecutor'.<sup>83</sup> The Maine thesis is thus a striking example of legal ethnocentrism. It is an aspect of a general ideological disposition which assumes both the naturalness and universality of the bourgeois code of individualism and transplants it, transmuted, even into relations which are communal, and hence anti-individualist, to their core. The old is remade in the image of the new.

For the prehistoric person the kinship-based commune (initially the horde, later the clan) to which he or she belonged was everything. It was such person's entire universe. The idea of an individuality separate from the commune was

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82 See Mair op cit 146.

83 Hoebel & Frost (1976: 288).

inconceivable. The prehistoric worldview was, fundamentally, a communal worldview, derived from the harshness of the material conditions of existence.

The savage, says Lafargue:

‘has no conception of his individuality as distinct from the consanguine group in which he lives’.<sup>84</sup>

Reed observes that:

‘individualism was so poorly developed in primitive society that there was no term to express the individual as an entity apart from the group’.<sup>85</sup>

There was a complete identity between the individual and the primitive commune. The individual was the commune and the commune the individual. ‘The clan was all in all.’<sup>86</sup>

The Maine thesis stands in stark contradiction to the fundamentally anti-individualist outlook of the primitives. It imports the autonomous individual into a universe in which the founding value is not individualism but group solidarity, thereby rendering a historically specific human quality natural and suprahistorical. But, as Briffault reminds us:

‘Primitive human nature differed considerably from what we often assume to be human nature in general. Primitives do not think in terms of their ego and its interests, but in terms of the group-individual ... The individualism which is the alpha and omega of the motives of modern man is not a primitive character but a product of social evolution, which has developed mainly, if not solely, in relation to social circumstances, and more especially to the growth of personal property.’<sup>87</sup>

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84 Lafargue op cit 11.

85 Reed op cit 161.

86 Lafargue op cit 12. Of course, the absence of individualism in primitive society did not imply a corresponding absence of individuation. See Diamond op cit 160 and Cameron (1973: 26-27) in this regard. It is arguable, with Lafargue (op cit 11), that prehistoric people were ‘individually completer beings’ than us postmoderns. See further Briffault (1959: 266-8) and Reed *ibid* 159-162.

87 Briffault *ibid* 268.

The schism between the public and the private proposed by the Maine thesis for prehistoric society is thus indefensible, except in the very limited sense that in the absence of a state which is authorized to resolve them, disputes and conflicts have to be dealt with 'privately'. But there is no sense in which the prehistoric individual actually acted or could have acted as a 'private prosecutor' to secure satisfaction for an injury suffered at the hands of another autonomous individual. As there could not be crimes in a stateless society, so there could be no independent sphere of the juridical private in a communist one.

## 2.9 Prehistoric Conflicts and Blood Revenge

Prehistoric communism meant, necessarily, that both personal injuries and the response thereto were communal issues. A harm inflicted upon a member of the commune was, literally, a harm suffered by the entire commune.

'Where the interests of one member are the interests of all, an injury to one is an injury to all.'<sup>88</sup>

The notion of a private injury or dispute was not feasible in the prehistoric epoch. There was thus no conception of a 'crime' or wrong against *a person*. All 'crimes' struck a blow against the survival of the commune, and were thus perceived as offences against the commune as such.

This may be difficult for the modern or the postmodern mind to comprehend, but it is the only logical materialist explanation of the prehistoric approach to 'crime'. Communism in production gave rise to a communal understanding of 'crime and punishment'. The unity of member and commune meant that:

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88 Ibid 267.

‘All quarrels and disputes were settled by the whole body of those concerned ... In conformity with rules that had become established through centuries-old custom, the whole community sat in judgement on the conflicts that emerged, and defined the consequences.’<sup>89</sup>

Prehistoric justice was non-legal. In the stateless societies of the epochs of savagery and barbarism there could be no notion of any specialized coercive institutions. There was only the commune, and it was everything and it took responsibility for everything. In such circumstances of communal predominance, ‘the kin unit was the juridical unit, just as it was the economic and social unit’.<sup>90</sup>

The original form of justice was quite simply, and necessarily, vengeance. As intimated earlier, in conditions of savagery and barbarism, an injury to or the death of one member of a commune put the future of the entire commune at risk. The natural response was therefore to seek revenge against the offender and/or his kin. This response was rooted in the human instinct for self-preservation.<sup>91</sup> The ‘first law of life’ was self-preservation; the ‘first law of man’ was revenge.<sup>92</sup> In prehistoric society, it is in her membership of the commune that a person's identity is rooted. It is by her contribution to the construction of the solidarity of the commune that the individuality of each member is secured. An attack upon any member is thus an attack upon the life of the commune. It has to be avenged, not by the individual victim but by the commune. There is no other way to obtain justice. There is no property which can be offered or taken in compensation. There is no central judicial authority which is able to impose punishment upon and enforce it against the offender. There is only communal justice which, in the material conditions of prehistory, can initially only take the form of communal blood revenge. Thus, Lafargue says of the primitive communards:

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89 Lafargue op cit 167.

90 Diamond op cit 268.

91 Lafargue op cit 161.

92 Seagle op cit 36.

‘They put offences in the common fund, like everything else; an injury done to one savage is resented by the whole clan as if it were personal to every member; to shed the blood of one savage is to shed the blood of the clan. All its members consider it their duty to wreak vengeance.’<sup>93</sup>

Blood revenge begins as an instinct, progresses to a duty and is then transformed into a social custom. The commune becomes entitled, by custom, to take revenge for the harm suffered by its member. Such harm is felt collectively, and is avenged communally. The aboriginal justice was thus the justice of communal revenge.<sup>94</sup>

The offender, like the victim, was a member of a commune. And hence the offence was collectivized. The entire commune of the offender becomes a legitimate target of the vengeance of the victim's commune. There was no individual victim and there was no individual offender. There was only the collective injury to and collective vengeance of the victim-commune against the offender-commune.

‘The savage, who understands his existence only as an integral part of his clan, transforms the individual offence into a collective offence; and vengeance, which is an act of personal defence and self-preservation, becomes an act of collective defence and self-preservation.’<sup>95</sup>

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93 Lafargue op cit 165.

94 The discussion which follows deals only with inter-communal conflicts. If the injury was intra-communal, that is, if the offender and victim were kin, the typical sanction was expulsion from the commune. This usually amounted to the offender being condemned to a solitary existence, which, to one who knows only the solidary relations of life in the commune, must have been a truly terrifying prospect. According to Vermes (op cit 44-45) expulsion was, in the material conditions of prehistory, ‘a measure essentially equal to physical annihilation, for the man banned from his community was in his solitary and unequal struggle against the forces of nature, condemned to death.’ See also Roberts (1979: 85-86) and Reed op cit 40. Even if the material conditions were favourable to solitary survival, it was highly likely that a person severed from a commune would die, anyway, from loneliness, or go insane from social deprivation.

95 Lafargue op cit 166.



The primitive system of communal ‘crime and punishment’ meant that any member or members of the offended commune could exact blood from any member or members of the offending commune.

## 2.10 From Blood Revenge to the *Lex Talionis*

The aboriginal blood revenge was unbridled and indiscriminate, and would easily lead to the protracted belligerence of a blood feud between the two communes. As Vermes observes:

‘In the beginning the means of retaliation of injuries inflicted on the community by external agents was the unrestricted vendetta or blood feud, which extended to the whole community of the man outraging the community in question, and purposed the extirpation of all members of the insulting community, i.e. it meant warfare in its essence.’<sup>96</sup>

However, the dangers of the unmitigated blood feud, including the possible extermination of both communes, impressed themselves very early upon the minds of the prehistoric communards. They were here faced with a choice which was, literally, of vital significance: collective revenge versus collective self-preservation.

The impulse towards collective self-preservation triumphed. The passion for unlimited revenge was reigned in and replaced by a system of controlled and calculated revenge. The imperatives of collective self-preservation led prehistoric humanity away from the law of the open vendetta to the law of retaliation. Revenge could still be had, but it could no longer be total. It was to be exacted in like measure to the injury suffered by the offended commune. Whereas initially all members of the offending commune were fair game, now only so many as had caused the harm could be the target of vengeance. This was the principle of retribution or the *talio* principle, based on a code of exact equivalence between

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96 Vermes op cit 44. See also Seagle op cit 36.

harm suffered and revenge taken.

It is a code which has its most popular expression in the biblical injunction: 'life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burning for burning, wound for wound, stripe for stripe'.<sup>97</sup> This was the law of retaliation or retribution, an extension to punishment of the fundamental communist spirit of equality which governed all other aspects of prehistoric existence. As Lafargue observes:

'Retaliation is merely the application of equality in the matter of satisfaction to be awarded for an injury. It is the equalized expiation of the offence. Only a damage exactly equal to the offence committed - a life for a life, a burn for a burn - can satisfy the equalitarian soul of primitive men. The equalitarian instinct, which in the distribution of food and of goods imposed the equal share, created the law of retaliation.'<sup>98</sup>

The communards found it necessary to set limits to the blood feud. In doing so, they reproduced their primary existential principle as the law of retribution.

The *talio* principle thus emerges out of the collective instinct of self-preservation, and is governed by the communist devotion to perfect equality which governed the social existence of prehistoric humankind. The prehistoric *talio* began, literally, as a death-exchange system: a death for a death, according to the principle of exact equivalence.<sup>99</sup> Thereafter it was extended to incorporate non-fatal injuries, also according to the principle of equivalence. The prehistoric law of retaliation entailed the extension of the communism of life also to death and injury. It was a progressive and historic development which took humankind a step higher on the ladder of social evolution.

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97 Book of Exodus: Chapter XXI, Verses 23 and 25.

98 Lafargue op cit 168.

99 See Reed op cit 223-225 and Lafargue ibid 166-168.

‘The principle of equivalence was a major achievement for ancient humanity when the hazardous conditions of life and the ignorance of natural death are considered. It held down reprisals to a rigid minimum: one for one and no more.’<sup>100</sup>

The victim-commune was still entitled to vengeance, but it had to be exacted only as ‘just deserts’, according to the principle of equivalence. This both satisfies the natural passion for revenge and prevents such passion from becoming a danger to the existence and reproduction of the commune.

The egalitarianism of the primitive *talio* extended also to the target of vengeance. Since all members of a commune were perfectly equal to one another, if one of them had to be the target, any one of them was a legitimate target. The specific communitarian who caused the harm was not the prescribed target. His entire commune was.<sup>101</sup> In this regard, then, primitive retaliation remained essentially indiscriminate. All the members of the offended commune were entitled to mark for vengeance any member of the offending commune. But blood revenge was at the same time highly regulated. It was aimed at preserving life in already precarious material conditions, and not causing death. The principle of equivalence meant, literally, that account had to be made for each and every death. The death-exchange system was aimed at preserving or restoring the fraternal relations with other communes upon which the life of the commune depended. An episode of death-exchange was thus normally closed by a session of gift-

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100 Reed *ibid* 227.

101 See Reed *ibid* 218: ‘Since primitive blood kinship was established on a communal basis, blood revenge was likewise communal. The whole community was held responsible for the actions of each individual member. It was not necessary that any specific culprit be found and killed in reprisal for the death of a kinsman - any member of his community would suffice to satisfy the claims of blood.’ See also Lafargue *op cit* 165: ‘The offence is collective like the injury. The offended clan takes vengeance by killing any individual whatever of the offending clan.’

interchange between the two communes.<sup>102</sup>

In prehistoric times justice was necessarily vengeance. There was no other form of justice which could be conceived by savage and barbarian peoples. Their response to 'crime' was completely natural, and in accordance with the communist principles which governed their existence. Historically, then, retributive justice was the natural and necessary product of the epoch of primitive communism. The principles and practices of the *talio* developed logically from the material conditions in which humankind originally found itself. It is worth noting, in this connection, that since prehistory comprises by far the largest part of humankind's existence, retributive justice, as equivalent physical retaliation, is historically the pre-eminent human response to the question of 'crime', that is, the pre-eminent form of punishment.

## 2.11 The Rise of Civilization: From the *Lex Talionis* to Composition

It will be recalled that the proponents of restorative justice generally posit the restorative sanction as aboriginal, if not exclusively, then as one of a number of options relied upon by our ancestors to deal with disputes. This view appears to derive from like pronouncements by certain anthropologists and legal historians. Stein's comment in this connection is typical:

'The principle of compensation is as prominent as that of retaliation even in the simplest societies. They are seen as complementary rather than opposed to each other.'<sup>103</sup>

However, this statement cannot be correct, certainly not as a generalized proposition about the penal culture of prehistoric societies. Had savage and

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102 See Reed *ibid*: 'Blood revenge therefore represents a system of punishment and counter-punishment between two communities but one that is regulated to prevent a total rupture between them. Hence, after the punishment, peace and fraternity are restored through the exchange of feasts and gifts.'

103 Stein (1984: 19). See also the anthropological sources relied upon by Weitekamp *op cit*.

barbarian justice included a restorative mechanism, it would typically have been a form of composition.<sup>104</sup> However, composition (other than in the form of blood compensation) requires the general availability of surplus goods which can be tendered as solatium by the offending commune and accepted by the offended one. Prehistoric society was first and foremost a subsistence society. Production was geared towards procurement of the necessities of existence. Surplus production was minimal, and whatever surplus was available would have been applied to the upkeep of the very young, the infirm and the aged. Whatever composition did exist in the prehistoric world had to be the exception rather than the rule.

Just as people who existed in 'an aboriginal state of non-property' could not have had serious or sustained disputes about land and other forms of property,<sup>105</sup> so they could not have relied upon a system of dispute settlement, such as composition, which was proprietary in its essentials. Composition as a generalized mechanism of social control was neither conceptually nor actually possible for the bulk of the many millennia which constituted the prehistory of the world.<sup>106</sup> Certainly, it could never have been on par with the *talio* system, as the restorationists suggest. Communes had nothing which could be proffered and taken in compensation for offences, except their members' bodies and body parts. The material realities of humankind's prehistory guaranteed the primacy of the *lex talionis*.

Composition did, however, find an early niche in the interstices of the *talio* system. It had a significant presence especially in the epoch of the break-up of

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104 Composition is used here as the generic term for all the concepts and procedures which seek, by way of a make-up, to repair the harm caused by the offender's conduct (as opposed to those which entail taking revenge).

105 See Fried (1967: 71-72).

106 See Seagle op cit 42 and Diamond (1951: 22).

barbarism and the transition to civilization, that is, in the twilight of prehistory, after the Neolithic revolution had made the production of regular surpluses possible and private property was making its debut on the historical stage. During this period, exchange and the circulation of commodities became a feature of economic life, albeit still secondary to and dependent upon the production of use values in the primitive commune. However, despite its subordination to the natural economy, the growth of the market proceeded apace. These conditions facilitated the emergence of composition as a means of resolving inter-communal conflicts.

Indeed, it appears that composition became a fairly common method of dealing with disputes amongst peoples in the late stage of barbarism, around 3000 BC. Childe classifies this period as the era of the urban revolution, marked by the growth of town settlements and the emergence of a stratum of specialist craftsmen such as potters and smiths. These latter lived by exchanging their products for the surplus products of their food-producing customers.<sup>107</sup> This is the beginning of the commodification of the social surplus. The development of this material process had a juridical parallel in the arena of dispute settlement. Hitherto the standard response to injury had been blood revenge, governed by the talionic equation in terms of which retaliation had to correspond exactly to the harm suffered by the victim-commune. Now a pecuniary equivalent to the harm suffered began to occupy one side of the equation. The talionic equation was being transformed into an economic equation, and the customary system of blood revenge was giving way to the legal institution of composition.<sup>108</sup>

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107 See Childe (1964: 77-87).

108 See Newman op cit 163.

As a means of dealing with social conflict, composition was obviously much more attractive and much less dangerous than blood revenge for the social well-being and general survival of the barbarian commune. Hence its fairly rapid development during the late barbarian era, when the material conditions for its existence had come into being. Indeed, many barbarian tribes embraced the institution of composition and created detailed tariffs according to which the victim-commune was to be compensated. The commodification of the social surplus thus entailed a qualitative shift in the law of retaliation. On the basis of material developments in the production process, humans were able to raise the *talio* principle from the brutally corporeal to a calculated abstraction. In place of the physical identities of blood revenge there now arose the regime of economic equivalents.

The physicalities of the *talio* were each ascribed an economic value, bodies and their organs were now valued in relation to a universal equivalent of some sort. The latter was a commodity which served as a standard of value against which all other commodities could be exchanged. The universal equivalent shifted commodity exchange from physicality to generality. Its invention represented another qualitative leap in the intellectual development of our forebears, enabling them to advance beyond the exactitudes of identity in exchange to the abstractions of equivalence.<sup>109</sup> The institution of composition was, in this respect, the law of retaliation commodified. Lafargue expresses the transformation thus:

‘Then instead of life for life, tooth for tooth, beasts, iron or gold are demanded for life, tooth and other wounds.’<sup>110</sup>

109 In the beginning, the most important products in a region (cattle, wheat, rice, salt, tools, etc) would be used as the universal equivalent. Later precious metals took over, as valuable objects replaced anatomical parts in the talionic relation. See Reed op cit 222.

110 Lafargue op cit 174.

Humankind thereby made a further substantial juridical advance: harms need no longer be avenged physically, they could be composed pecuniarily. However, this advance was in itself an index of the emergence of social inequality which, in the historical period, would develop into a class structure and deny the majority of humankind the benefits of this transformation of the law of retaliation.

It can be owned readily that composition did exist and occupy a significant place in the penal culture of higher barbarism. However, it was not and could not have been the dominant, or even the co-dominant, prehistoric response to inter-communal injuries and disputes. Given that the fundamental structural features of the prehistoric world were communist, its justice was eminently and necessarily retaliatory. Composition developed but late, in the epoch of the break-up of primitive communism, when the material prerequisites of civilization had already sprouted in the soil of barbarism. Whereas the *talio* was an expression of the egalitarian structure of primitive society, composition was a signpost *en route* to the class structure of civilization. Whereas the talionic remedies were always available as of right to the populace as a whole, composition was, virtually *ab initio*, a restricted option, structured by class criteria.

The material basis of composition was the commodification of the social surplus. It arose at a time when the contradiction between the forces and relations of production of barbarism was at its sharpest, and its development presaged the class justice of civilization. It is in this context that the restorationists' historical claims must be comprehended. The restorative aspect of primitive justice was not aboriginal. It surfaced only in the twilight of prehistory, in material conditions pregnant with all the antitheses of the community justice posited by the restorationists. Retaliation was community justice. Composition prefigured class justice. The two were not synchronous, either in time or in substance. The former was an expression of millennia of social egalitarianism, the latter of the recent



emergence of social inequality. With the transition from prehistory to history, from barbarism to civilization, both would be injected with an unmistakable class character.

Civilization was born of the disintegration of primitive communism. The historical successor of the gentile constitution was the class system. The non-antagonistic relations of the primitive commune were replaced by the fundamentally antagonistic relations of class. Civilization and class formation were historically coterminous. The achievements of the epoch of civilization were won on the basis of the social inequality which was entailed in the division of society into two great and opposing classes: one productive, the other not; one ruling, the other ruled.

## **2.12 The Asiatic Mode of Production**

The first form of class society emerged some 5000 years ago, with the great river-valley civilizations of Egypt, Mesopotamia, India and China. The large-scale irrigation works which characterized these societies revolutionized agriculture and made possible the production of permanent surpluses for the first time in human history. Marx classified the mode of production of these alluvial or hydraulic societies as Asiatic. The ruling class comprised an aristocracy which was fused, more or less, with a managerial-bureaucratic elite of state officials, administrators, scientists-engineers, priests and military leaders. There was an almost total congruence between the state and the ruling class.

The dominated class was made up of peasant farmers whose labour formed the productive foundation upon which the famous cities of this era arose. Between the two major classes were minor classes of merchants and urban

craftsmen. They were essentially parasitic upon the surplus extracted by the state from the peasant producers. There was also a sizeable slave population, but it was not pivotal to the structure of production in Asiatic society.<sup>111</sup> The outstanding proprietary feature of the Asiatic mode of production is the absence of private property in land.<sup>112</sup> The peasant producers continued to live in self-sufficient village communes very like those on which the gentile constitution had been based. And production in the Oriental commune was still primarily devoted to the creation of use-values.<sup>113</sup>

The survival of such features of primitive communism and natural economy notwithstanding, it must be stressed that the Asiatic formations were class societies in all their essentials. This was most apparent from the fact that the social surplus product of the peasant producers was appropriated by the ruling class, in the form of ground rent or taxes. The commodification of the surplus which had begun in the era of late barbarism now became more and more widespread, primarily because the surplus was so much bigger and was relentlessly extracted from the direct producers by the ruling class. The latter lived lives of conspicuous opulence, and the market for trade in manufactured goods grew significantly, as towns became virtual manufactories for the production of luxuries and other goods to satisfy the tastes of the emperor and nobles. Needless to say, the direct producers had to make do with bare necessities, sometimes with less. The benefits of the urban revolution, which was based upon their labour, did not reach them. They became the victims of the civilization which they built.

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111 See Melotti (1981: 59-62).

112 See Mandel (1971: 15) and Melotti *ibid* 54. The state, in the person of the ruling despot, was the only landowner. There was private property in movables.

113 See Mandel (1977: 58): 'The whole of the economy appeared indeed like a great estate producing use-values to satisfy its needs.' See also Melotti *ibid* 56-57.

Also, although production in the Asiatic mode was essentially for use, exchange of and trade in the social surplus grew significantly. The steady commodification of the surplus is evident from the fact that, by about 2000 BC, the precious metals, especially silver, had ousted all other competitors as universal equivalent. From here it was but a short step to the role of universal equivalent being occupied exclusively by the 'commodity of commodities', money.<sup>114</sup> The natural economy was being invaded by the commodity and its apotheosis, money. Whatever had survived of the gentile constitution was under implacable assault from and inexorably succumbing to the contrivances of civilization.

The 'civilizing mission' of the class system in Asiatic society extended, of course, also to the juridical. This is the era of the birth of law proper. Custom was superseded by law, and the curial apparatuses of the state replaced the commune as the locus of adjudicative authority. It was the era in which the communard was 'liberated' and reconstructed as the legal subject. The famous Code of Hammurabi (*circa* 1750 BC) represents the high-water mark of the legal development of Asiatic society. Its 282 sections comprise a reliable source of information about both the nature of Asiatic law and the economic structure and social organization of the typical alluvial society. And even though the Code may be read in large part simply as a written collection of existing customary practices, it was in fact qualitatively different from these. For it was the legislative creation of the ruler of a class state, the antithesis of the gentile constitution, and it confirmed the formal transformation of custom into law.

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114 The installation of money as universal equivalent was undoubtedly an index of the steady growth of commodity production and hence of the demise of the natural economy. In this regard, the Asiatic mode of production was certainly the gravedigger of the primitive commune. However, commodity production in this epoch, as in all precapitalist epochs, remained petty, as represented by the circuit C-M-C. Production of exchange-value was at this stage not the rationale of the production process but merely an adjunct to that rationale, namely, production for use or direct consumption.

Despite the persistence of communal social relations structuring an economic system dedicated to the production of use-values, the Code was a class construct. It gave express recognition to the social classes which made up Asiatic society, prescribed different legal treatment for these various classes and made no concessions whatsoever to the egalitarian morality of the primitive commune. Law was, in this regard, infused with the ethos of class and, hence, of inequality from the beginning.

Criminal law in Asiatic society was rudimentary. There is in the Code of Hammurabi no clear distinction between criminal and civil law as we have come to know it. It is true that the Code does recognize and prescribe sanctions for a range of conduct which we would today classify as criminal. But, despite its despotic and hypertrophied nature, the Asiatic state had not yet invented the notion of a crime as an attack upon its sovereignty or as an offence against its integrity. Subsequent historical states would take this step, to claim crime and punishment as their own, and to deny the parties the right to resolve *inter se* the conflict engendered by criminal conduct. The Asiatic state, however, did not yet construe individual injuries as public ones.<sup>115</sup> The primitive *talio*, as blood revenge, survived into this first period of the epoch of civilization. But it was the *talio* transfigured and blood revenge transformed, as both were contaminated with the imprints of those two standard bearers of civilization, namely, class and the commodity. Primitive justice could not withstand the frontal assault upon egalitarianism and communalism entrained in the forward march of civilization.

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115 The Asiatic state was certainly powerful enough to define crimes as offences against it. It did not do so, probably because of the coincidence between itself and the ruling class. Offences by members of the oppressed classes against members of the ruling class were, in fact, simultaneously offences against the state, and were severely punished.

Asiatic criminal law was overtly class-based and unambiguously biased in favour of the ruling class. The Code of Hammurabi identifies three social classes, namely, freemen, plebeians and slaves.<sup>116</sup> It retains the *talio*, as a system of punishment based upon exact equivalent retribution, but removes its original communal aspect and invests it with a class character. Retaliation became essentially a credo of the ruling class, the freemen, and the blood revenge of prehistory was transformed into the blood feud, according to which freemen and their families settled intra-class criminal disputes, including murder. The Code required freemen to take revenge against freemen according to the talionic equation. But freemen were entitled to revenge many-fold against plebeian and slave offenders, to whom the benefits of the talionic equation did not apply. The Code also did not make talionic vengeance available to plebeian and slave victims of the transgressions of freemen. These were composed: the patrician offender faced nothing more than a pecuniary sanction.<sup>117</sup> This was the *talio* commodified. The commodity of commodities was enlisted as a class weapon, at the disposal of noble offenders. The physical injuries they inflicted upon their lower-class victims were transformed into values, measured against the universal equivalent.

Composition in the first historical societies was thus unequivocally a ruling-class contrivance, already thoroughly imbued with the spirit of the commodity. The plebeian and slave victims of ruling-class offenders were inserted, effectively, into the commodity circuit: the social surplus which the offenders appropriated could be employed to purchase and consume the victims' injuries, like so many luxuries. These were thereby eradicated, if not in fact, then certainly in law. The

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116 See Edwards (1937: 63) and Diamond (1950: 31).

117 See Diamond *ibid.* See also sections 196 to 214 of the Code of Hammurabi in Edwards *ibid* 43-44.

anti-egalitarian tendencies apparent in the prehistoric beginnings of composition matured early in the historical epoch.

When restorationists refer to the 'ancient' roots of restorative justice they refer, essentially, to composition as a restorative sanction, that is, to those legal arrangements in terms of which offenders were entitled to or required to make good their trespasses by way of a compensatory offering to their victims. The restorationists tend to present such ancient restorative justice in general terms, without reference to social class or inequality. The impression is created that the restorative sanction was applicable and freely available to everybody. It is implied that ancient restorative justice was essentially egalitarian, involving all members of society and operating to mend harm and maintain social equilibrium. Hence its description as community justice.

However, this construction is, at best, utopian. It fails to comprehend the very strong and evident links between ancient restorative justice and class inequality. It takes no account of the material foundations of the restorative sanction. And it ignores the patent historical fact that there was nothing communal whatsoever about the class-selective manner in which the rights to composition and to retaliation were legally invested in the Asiatic formations. The restorationist belief in the existence of an ancient restorative justice thus has little historical basis. Primitive justice was community justice, but based on the principle of blood revenge, not restoration. The first form of civilized justice, as is evident from the Code of Hammurabi, was class, not community, justice and its restorative aspect had no community impetus at all.

### 2.13 The Slave Mode of Production

The Asiatic mode of production was followed, in world-historical evolutionary terms, by the ancient or slave mode of production. Civilization thus ‘advanced’ from Oriental despotism to European slavery. The Graeco-Roman societies of antiquity are archetypal in this regard.<sup>118</sup> And Roman law is paradigmatic of the penal jurisprudence which characterized the slave-holding epoch. Like their Asiatic predecessor, the Graeco-Roman formations too were fully fledged class societies, with all the necessary appurtenances of such societies.<sup>119</sup> And their approach to criminal justice, as evidenced in the criminal law of Rome, was structured by the same class concerns and class prejudices as were to be found in the alluvial societies. Civilized justice is class justice because civilized society is class society.

Roman criminal law was an advance upon Asiatic criminal law in that it accepted very early on the notion that certain human conduct, albeit directed against the interests of an individual victim, should be construed as an attack upon the integrity of the state. Thus, for example, Wylie tells us that ‘so far back as we can go’ Roman law treated murder as a crime.<sup>120</sup> Other early examples of *crimina* included high treason, perjury and arson. The list of crimes increased steadily and by the time of the emergence of the empire, ‘Rome had to a large extent evolved a

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118 This was not a linear development, except in the sense that the Graeco-Roman formations followed the Asiatic ones in time. But they were not the natural extensions of Asiatic society. The latter initiated civilization on a world-historical scale, but did not advance it beyond the basics, and more or less stagnated developmentally. The Graeco-Roman formations which did advance civilization did not arise via the Asiatic mode at all.

119 The emergence of these slave-holding societies coincided with the dissolution of the gentile constitution. The gravedigger of the primitive commune was private property in the means of production, including slaves and especially land. Aspects of the gentile constitution survived in the early years of the Roman republic. But these were battered and bastardized as the bulk of communards was transformed into pauperized plebeians (often condemned to debt slavery) and the bulk of the land became the private property of the patrician aristocracy.

120 Wylie (1948: 86).

criminal law proper'.<sup>121</sup> Punishment for the *crimina* was imposed and inflicted by the state and ranged from the death penalty through banishment, penal servitude and corporal chastisement to fines.<sup>122</sup> Composition was not a possibility for the offender, and the state punishments did not have any obvious restorative dimension.

However, the ambit of the Roman criminal law was initially fairly limited as compared to the modern law. Many conflicts continued, as in Asiatic law, to be treated as the concern of the wrongdoer and the victim, that is, as *privata delicta*. These included theft, robbery, injuries to person and malicious damage to property. The *privata delicta* were governed by the *talio* principle from the beginning. The victim and/or his agnates were entitled to blood revenge against the offender, but subject to the equivalence prescription of the *lex talionis*. However, by the time of the XII Tables, the *talio* principle had already been commodified, in the sense that physical retaliation for harm suffered could be had, according to Kunkel, 'only if the parties had failed to agree upon a money composition and thus to settle their dispute by means of a peaceful settlement'.<sup>123</sup>

The XII Tables also prescribed the compensation to be paid in certain cases.<sup>124</sup> Composition was clearly a major element of the law of *privata delicta* early on already. Indeed, according to Jolowicz & Nicholas:

'Roman law was at the time of the XII Tables in a state of transition from voluntary to compulsory composition for private wrongs'.<sup>125</sup>

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121 Burchell & Hunt (1983: 14).

122 See Mackenzie (1991: 422-429).

123 Kunkel (1966: 28). See also Thomas (1981: 349-350).

124 See Thomas *ibid* 350.

125 Jolowicz & Nicholas (1972: 172).



In the later empire many of the *privata delicta* were transformed into *crimina extraordinaria*, that is, into crimes proper. But the possibility of composing them remained, as the victim had the right to:

‘elect between criminal and civil punishment. Presumably his election was dictated by whether the offender was worth powder and shot.’<sup>126</sup>

All in all, then, composition appears to have been either a requirement or a possibility throughout all the periods of Roman law, at least as regards the ‘crimes’ which were dealt with as *privata delicta*.

However, any attempt to enlist the Roman institution of composition to the cause of the contemporary restorative justice movement must needs be assessed in relation to the social structure of Roman society. As already intimated, the ancient mode of production was a slave mode of production. In the Graeco-Roman formations the ‘basic labour everywhere was slave labour’.<sup>127</sup> The owner-slave relationship embodied the core social relations of production. The slave was owned by the slave-holder:

‘The slave was always at Rome, so far as the law was concerned, a piece of property.’<sup>128</sup>

Slaves were essential means of production. Their ability to labour, to put the instruments of production into motion, formed the basis of the process of production in the Graeco-Roman world.

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126 Burchell & Hunt op cit 15.

127 Cameron op cit 187. A substantial amount of slavery did exist in the hydraulic societies, and some also in the barbarian era of the prehistoric commune. But slavery was never the socio-economic basis of these modes of production. Also, the earlier forms of slavery were not private. Slaves were ‘owned’ either by the commune or by the state. Only the ancient mode of production was a properly slave-holding mode.

128 Jolowicz & Nicholas op cit 133.

The basic class contradiction in ancient Roman society was that between *liberi* and *servi*.<sup>129</sup> The fundamental legal divide was that between persons and things. *Liberi* were persons. Slaves were not. At best, in law 'the Roman slave was a hybrid, both person and thing',<sup>130</sup> that is, 'a man-thing'.<sup>131</sup> But it must be stressed that the elements comprising the 'man-thing' relation were not equiponderate. It was the slave's *res*-status or thingness which dominated in law. The slave was, in this regard, considered a species of *res*, the unique *instrumentum vocale*, and hence a legal non-subject. He was a thing whose value depended on his human qualities, but whose legal status was constructed on the basis of the denial of those qualities. Thus, 'as a person, the slave had no rights' in law.<sup>132</sup>

Such literal reification of the human subject was the necessary and essential legal presupposition of the ancient mode of production. It was the key to the destruction of the primitive commune and to the transformation in the social relations of production which made possible a qualitative leap in the productive capacity of human society. This stage of civilization was premised upon the commodification of the human body itself. The person became the commodity. The entire human body was transformed into a form of private property which could be inserted into and move through the commodity circuit, like any other item of private property.

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129 See Van Zyl (1983: 81). For most of its existence Rome had many more slaves than *liberi*. For example, Cameron (op cit 191) records that during the time of Cicero, Rome had a population consisting of some 900 000 citizens and 4 500 000 slaves. More than 80% of the population was thus servile and legal non-persons.

130 Thomas op cit 393. See also Spiller (1986: 48).

131 Hindess & Hirst op cit 112.

132 Thomas op cit 394.

The man-thing of Roman slavery was a combination of two components, namely, the slave-as-thing and the slave-as-person. The notion of the slave-as-thing meant, in practice, that the slave-holder had absolute power over his existence. As with any item of private property, the slave could be used, abused and even destroyed by the owner with impunity.<sup>133</sup> Thus, Cameron tells us that ‘a master could legally kill a slave as he could an animal’.<sup>134</sup> And Thomas states that the slave was ‘at the mercy of his master who had the power of life and death over him’.<sup>135</sup>

The idea of the slave-as-person was especially pertinent to the criminal law. Here the slave was deemed by law to be more than a mere *res*, to possess legal subjectivity. But it was essentially a negative subjectivity, granted in order to visit criminal liability upon the slave.<sup>136</sup> The slave-holders were, it appears, prepared to grant the offender slave a temporary legal *persona*, for the sole purpose of

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133 See Vermes op cit 48.

134 Cameron op cit 194.

135 Thomas op cit 394. This position continued into the so-called golden age of the imperial era, during which era, according to Manfred (op cit 116-117), ‘the slave-owners strove to squeeze all the profit they could out of their slaves and did not refrain from using the most bestial forms of exploitation. The lot of the slaves was exceedingly cruel. For the tiniest misdemeanour they were incarcerated in special prisons which existed on every estate, were made to work in fetters, beaten and put to death. The slaves were held in subjection by means of overt terror. On one occasion a noble Roman was killed by his slave: in accordance with the law ... all his town slaves - in this case there were 400 of them - were liable for the death penalty ... all 400 of the slaves were put to death.’ Often, as the passage above shows, all the slaves owned by a slave-holder had to pay for the offence of one of their number. The Roman ruling class was prepared to protect the slave system by reverting to the excesses of communal revenge against a segment of the dominated class. Civilization based on slavery reinvented a system of punishment, but only for the class of slaves, which the prehistoric barbarians had long abandoned in favour of the law of retaliation. The principle of equivalence on which the law of retaliation was based would raise the *instrumentum vocale* to the level of personhood, and would undermine the fundamental premise of slavery. Hence, the brutality of slave punishments. Hence the law which visited death upon an entire household of slaves as punishment for crime of one of its number. Subsequent laws which regulated the owner’s power over slaves had little to do with improving the lot of slaves and everything to do with protecting and maintaining the system of slavery intact. See also Cameron op cit 194 and De Ste. Croix (1981: 459-460).

136 According to D.48.2.12.3, as cited in Spiller (op cit 51), when the law deals with a crime by a slave, ‘the same rule should be observed as if he were free’.

using the law to punish his errantry and to put him back in his place, to reduce him to the 'piece of property' he really was. Slave punishments were invariably corporal or capital. Composition was never an option for the slave offender.<sup>137</sup> Roman criminal law operated a dual system of punishment, demarcated strictly in class terms: penalties for slave-owners were lighter than penalties for slaves.<sup>138</sup>

Thus, although composition became a part of Roman law early on, it was, as the *talio* commodified, available only to offenders from the ranks of the *liberi*, who were legally entitled to proffer the victim compensation as a way of avoiding the talionic retaliation. The human commodity was always excluded from the benefits of the commodification of punishment which composition entailed. This was, of course, a structural attribute of the slave system, for the slave owned no property, not even his own body - he *was* property - with which to compose an offence. The real effect was that the bulk of the Roman population was legally excluded from Roman 'restorative justice'.

The secondary class contradiction in Roman society was located within the ranks of the *liberi*, between the *honestiores* and the *humiliores*.<sup>139</sup> Composition, although available to them, could likely not be afforded by the bulk of offenders from the class of *humiliores*. They would have had to suffer the punishment, talionic or state, prescribed for their crimes. In practice, then, it was the members of the Roman ruling class, the *honestiores*, who were the real beneficiaries of the institution of composition. The wealthy *liberi* were the only members of the

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137 Conversely, the slave victim could not accept compensation for his injuries. Such compensation would have been arranged by and would have accrued to the slaveholder. See Institutes of Gaius 3.222, as cited in Spiller (op cit 49): 'A slave is not considered personally to suffer outrage, but an outrage is held to be committed through him on his owner.'

138 See De Ste Croix op cit 458 and Cameron op cit 194.

139 The former comprised the upper classes of the free population, the latter the lower orders. See De Ste Croix op cit 458 and Kunkel op cit 65.

Roman population who possessed both the legal right and the proprietary means to pay for their crimes, literally.

Roman law thus does not provide any substantive support for the historical arguments of the advocates of restorative justice. Much the same conclusion as was reached in relation to Asiatic law is valid also for Roman law: the institution of composition was thoroughly imbued with the precepts of class inequality; it had very little to do with restorative justice and everything to do with class justice.<sup>140</sup> It was only the Roman ruling class that was not, in one way or another, prejudiced by the restorative veneer of composition. Both the *servi* and the *humiliores* had to negotiate its oppressive class contours.

#### 2.14 The Feudal Mode of Production

Of all the historical epochs, it was the Middle Ages, the epoch situated between the fall of the Roman Empire and the modern era, which was most accommodating of the institution of composition. This was an era during which, as Vermes notes:

‘the institutions of the blood feud and the talio were resorted to exceptionally only, and composition in terms of money had become the dominant punishment’.<sup>141</sup>

Haynes confirms the point about medieval criminal justice:

‘Crimes were met by restitution, not punishment. Every sort of injury was atonable by a money compensation paid to the injured man or his relations.’<sup>142</sup>

For a killing, the offender had to pay his victim's *wergild* or worth money to his kin; for injuries, the offender had to compensate the victim with payment of *bot*,

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140 See Vermes op cit 48.

141 Ibid 51.

142 Haynes (1935: 209).

according to a detailed injuries tariff, and he had to compensate the state with payment of *wite*.<sup>143</sup> Such pecuniary punishments were more popular in this period than in any other. And there can be little doubt that the Middle Ages did indeed constitute one of the most favourable historical terrains for the institution of composition.

A number of commentators present this epoch as particularly victim-friendly, as one in which the focus of the criminal law was upon the welfare of the victims of crime. Offenders had to make good the damage they had caused and restore the social equilibrium they had broken, by composing their offences. The primary concern of the criminal law was thus to ensure that offenders repaired the harm they had inflicted upon their victims and, by extension, upon the community. Often the medieval epoch is referred to as a 'golden age' of the victim.<sup>144</sup> Such a classification of the Middle Ages constitutes a major endorsement for the historical claims of the restorationists. Medieval criminal law and, especially, medieval sanctions can be presented as some kind of *Shangri-la* of restorative justice, thereby endowing the contemporary restorationist movement with historical legitimacy. This 'golden age' of the victim needs to be examined through the lens of historical materialism.

The medieval epoch was the epoch of the feudal mode of production, the world-historical successor of the ancient mode of production. The feudal

143 See Fry (1951: 32); 'In England in Saxon times, the *wer*, or payment for homicide, the *bot*, or compensation for injury, existed alongside the *wite*, or fine paid to the King or overlord.' See also Schafer (1977: 14), Mawby & Gill (1987: 36), Karmen (1990: 280) and Jacobs (1977: 46).

144 See Schafer *ibid* 5: 'The term 'golden age' of the victim refers to the time during which there was recognition of the victim's important role and an emphasis on compensation. The historical origin of the victim's dominant role in criminal procedure lies in the Middle Ages and is plainly evident in the system of "composition" (compensation) in the Germanic common laws.'

economy was essentially a natural economy, that is, an economy dedicated in its fundamentals to the production of use-values. It did, however, produce a substantial surplus, which was commodified and exchanged against the universal equivalent, money. It is the enhanced presence of the commodity circuit in the feudal economy which accounts for the triumph of composition as the premier feudal sanction.

Feudalism raised the commodification of the *talio* to its apogee. Unlike the ancient mode of production, feudalism was not based upon the commodification of the person of the direct producer. The serf was not formally a slave, and did possess a legal *persona*. But, for the purposes of the criminal law, at least, every man had a monetary worth prescribed legally:

‘From the king himself down to the poorest peasant scratching out a living on an under-tilled farm, every freeman had his value in money laid down by the law.’<sup>145</sup>

Every man also had a *bot* for virtually every part of his body which may be harmed or injured in a criminal assault. The feudal commitment to the interests of the victim, and hence to composition as the preferred criminal sanction was, if not absolute, certainly stronger, in formal terms, than in any other historical epoch.

However, and as suggested by the quotation in the previous paragraph, feudal society was, like its Asiatic and ancient predecessors, a class society. Feudal relations of production were structured by the contradiction and conflict between the two major social classes, the serfs and the feudal lords.<sup>146</sup> The serfs lived and worked on strips of land granted to them by their lords. As a class, the

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145 Bresler (1965: 17). Fry (op cit 32) records that the Frisians, a medieval Germanic tribe, valued a noble's life at 80s, a freeman's at 53s, and a serf's at 27s.

146 There were numerous levels of overlordship between the serf at the bottom and the monarch on top. There were thus also numerous levels of class contradictions. But they were all secondary to the primary contradiction between serf and his direct feudal overlord.

feudal lords were unproductive, and lived off the surplus which they extracted from their serfs. Serfdom was a legal status which subjected the serf to the juridical thrall of his lord. It entailed a legal obligation upon the serf to surrender to his lord a predetermined portion of his produce (quit-rent) or labour-power (*corvee*).<sup>147</sup> The serf had no choice in the matter. In other words, the serf was required by law to warrant the reproduction of the livelihood of the lord. Of course, the serf's own livelihood would become decidedly precarious if he did not comply with this legal duty.

Unlike its Asiatic and ancient predecessors, the feudal state was centrifugal.<sup>148</sup> There was no functional centralized repository of political power. Instead, it was parcellized and deconcentrated. The feudal manorial estate or signiory was the real locus of political power and hence of juridical authority. In relation to the serf, the king was sovereign in name only. It was his feudal lord who was the practical embodiment of sovereignty.

'In feudalism the lord stands in relation to serf as state to subject, seignoral power is state power writ small, and serfdom is the subjection of the serf to the state in the *person* of the lord.'<sup>149</sup>

'Government thus became a private affair; the prerogatives of office were owned as private property and inherited as private property was inherited ... Feudalism as a system of government may accordingly be defined as private assumption of public authority.'<sup>150</sup>

For the serf, then, the feudal lord was the feudal state personified. The feudal manor was the feudal state materialized. The person who exploited the serf economically also dominated him politically.

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147 See Thompson & Johnson (1965: 329-337) and Cameron op cit 248-249.

148 Anderson (1981: 152).

149 Hindess & Hirst op cit 224, original emphasis.

150 Thompson & Johnson op cit 291.



Indeed, as is well known, feudal exploitation was ‘non-economic’, in the sense that the appropriation of surplus by the feudal lord was premised upon his political power over his serfs. In the feudal epoch, political power entailed legal power. The seignior was the basic juridical unit of feudalism and the seignior the administrator and dispenser of feudal justice.<sup>151</sup> In fact, there was, for the most part, a coincidence between power and justice. The seignoral power was also the judicial power. Certainly, these two powers could be neither conceptually nor practically distinguished from each other. The feudal lord:

‘within the confines of his lands was not only a landowner but also a ruler, that is the individual invested with administrative and legal powers, as far as the commoners working in his particular seignior were concerned.’<sup>152</sup>

There was in feudal times, then, a type of justice which was derived directly from the social relations of production, a type of justice which, indeed, was the social relations of production expressed juridically. ‘Justice was the *central* modality of political power ... It was the ordinary name of power.’<sup>153</sup>

Feudal justice was thus incontrovertibly class justice. The ‘golden age’ of the victim was structured by an unmediated vinculum between class power and juridical relations. This meant, quite simply, that composition as a criminal sanction was not as accessible practically as it may have been available legally. In feudal times also, as in the Asiatic and ancient epochs, composition was thus essentially a ruling-class expedient. The rich could commit crimes, including murder, with no fear of being punished for their actions in any way, other than having to part with a modicum of their wealth. Composition was, however, not a genuine right of the poor, not even of the poor victim.

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151 See Tigar & Levy (1977: 25).

152 Manfred op cit 148.

153 Anderson op cit 152-153, original emphasis.

A criminal sanction which is delineated in terms of access to economic resources almost always favours the rich and disadvantages the poor. Medieval composition is such a sanction. This problem is acknowledged even by Schafer, the originator of the idea of the golden age of the victim:

‘The amount of compensation varied according to the nature of the crime and the age, rank, sex, and prestige of the injured party ... Thus, the “value” of human beings and their social positions were involved in determining compensation, and a socially stratified composition developed.’<sup>154</sup>

Wright, a contemporary restorationist, also admits the class character of feudal justice. His comments on composition in the feudal epoch deserve quotation at some length:

‘In so far as there was a golden age of the victim, this was it ... But class justice seems to have been practised: compensation for injury was confined largely to the nobility and the warrior class ... As for the poor man, with no kin, who became a victim, the historians do not say how he could enforce his claim. It appears that composition worked among equals, for example among the warrior class (and perhaps among serfs, although no evidence appears to have survived), but the majority of poor thieves, murderers and rapists were hanged, burned, drowned or mutilated, while from those who had the wherewithal as much money as possible was extracted by the victim or the lord, whoever had the most power. There was no question of equality before the law. Such a system, even if reparation was a key element, hardly deserves a halo.’<sup>155</sup>

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154 Schafer op cit 12.

155 Wright op cit 2-3. See also Bresler op cit 19: ‘Modern historians are divided as to what happened if a man could not pay his *bot*. Either way it was unpleasant. Professor Maitland says that he went into slavery or was outlawed; a more recent expert, Professor Plucknett, claims that his life was forfeit and in the gift of the injured party.’ See further Karmen op cit 280: ‘But fragmentary historical records confirm the suspicion that in a society with sharply defined classes, restitution worked to the advantage of the upper crust. If they were powerful enough, guilty parties could scoff at the claims of their social “inferiors”. If compelled to settle accounts, the affluent could easily make fiscal atonement for even the most outrageous breaches of the law through relatively inconsequential composition payments of gold, cattle, land or other valuables. On the other hand, offenses by the marginal against the mighty were not so readily resolved. The amounts specified were often beyond the resources of the common folk. Those who could not meet their obligations were branded as outlaws or were forced to sell themselves into virtual slavery. Restitution functioned as one of many mechanisms that made the rich richer and the poor poorer.’

It was implicit in the structure of feudal society that composition could not be other than class bound. One's position in the class system was an attribute of one's legal *persona*, and had important legal consequences. Lords enjoyed legal superiority over serfs and the other dominated classes. The feudal lord was the judicial authority in his domain. 'The man who had the land judged the man who had not.'<sup>156</sup> There was but little chance of a serf prevailing at law against a lord.<sup>157</sup> Feudal justice was thus class justice in terms of the law. And feudal composition was a system which operated to protect lordly criminals while throwing the poor ones to the wolves. It was a system suffused with the iniquities of class. It was a system which, as Wright so aptly observes, 'hardly deserves a halo'.

It must at this point be noted that the ambit of feudal composition was not comprehensive. Certain crimes remained *botleas*, that is, not commutable to pecuniary terms. Thus, for example, housebreaking, arson and treason were *botleas* crimes and hence outside of the feudal institution of composition.<sup>158</sup> These were met with corporal, often capital, punishment. Over time, the list of *botleas* crimes was slowly increased, as more and more crimes were deemed unemendable. This development became, by the late feudal period, a decisive shift away from composition as the typical criminal sanction. Late feudalism was a period which witnessed the emergence of physical punishments, many of which were surprisingly harsh.<sup>159</sup> The heyday of composition was over.

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<sup>156</sup> See Wright op cit 4.

<sup>157</sup> See Huberman (1968: 10): 'A quarrel between serf and lord was very apt to be decided in favor of the lord, since he would be the judge in the dispute.'

<sup>158</sup> See Wright op cit 3 and Bresler op cit 20.

<sup>159</sup> See Bloch (1965: 365).

## 2.15 The Age of Absolutism

The demise of composition coincided more or less with the rise of the centralized state. During the late feudal period, in place of the parcels of state power constituted by the myriads of feudal *latifundia*, there now emerged the true feudal monarch, who was able to impose his political will upon all his liegemen and to unite their disparate statelets into a single national state. The centralization of feudal sovereignty was based upon the support of the new urban middle classes which had emerged, with the growth of cities, in the tenth and eleventh centuries.

Urbanization and the growth of a market economy based upon money signalled the beginning of the downfall of the manorial economy. Huberman describes this transformation in the following terms:

‘After the twelfth century the economy of no markets was changed to an economy of many markets; and with the growth of commerce, the natural economy of the self-sufficing manor of the early Middle Ages, was changed to the money economy of a world of expanding trade.’<sup>160</sup>

The merchant masters of the money economies of the feudal cities found in the monarch their best weapon against the power of the feudal lords. The political defeat of seignoral power was accomplished on the basis of an alliance between the urban middle classes and the feudal monarch.<sup>161</sup> By the fifteenth century the national state had emerged, ruled by a king who had succeeded, with the backing of the cities, in centralizing political power within a determinate geographical area. The age of absolutism had arrived.<sup>162</sup> It was to be the gravedigger of composition.

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<sup>160</sup> Huberman op cit 26.

<sup>161</sup> See Tigar & Levy op cit 47.

<sup>162</sup> See Tigar & Levy ibid 42-46. See also generally Mehring (1975) and Mooers (1991).

The absolutist state was the political form required for the development of merchant capital. In the same way as the manorial economy needed the parcellization of state power, so merchant capitalism needed its centralization.

For the merchant:

‘the unification of all administrative and military power in *one* hand, princely absolutism, was an economic necessity.’<sup>163</sup>

Merchant capital was the dissolvent of feudal relations of production. It infiltrated money into the marrow of the manor, and led a frontal assault upon the integrity of the natural economy. Under its sway the insularity of the manor began to disintegrate, both feudal lords and serfs wanted after the perceived liberating power of money, and the regime of use-value began to succumb irreversibly to the regime of exchange-value.

Absolutism was the necessary political conjugate of this historic economic transformation. The latter required the former. Indeed, it elevated the political to primacy in the matrix of social relations of production. The birth of generalized commodity production could occur only in an absolutist political context. The central state arrogated to itself an absolute monopoly of force in order to guarantee the political milieu required for the impending transformation of the mode of production. The age of absolutism was thus the age which nurtured all the presuppositions of the capitalist mode of production.

In class terms, the absolutist state held the balance of power between two classes, representing two different and competing modes of production: on the one hand, there was the declining feudal nobility and, on the other hand, the rising bourgeoisie. The impasse in the struggle between these two classes for socio-economic supremacy facilitated the emergence of a centralized monarchy which:

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163 Mehring *ibid* 2, original emphasis. See also Kautsky (1979: 14-17).

‘represented a form of relative state autonomy, balanced on the countervailing pressures of the contending classes’.<sup>164</sup>

Neither class had the strength to defeat the other, and the state was able to establish itself as autonomous arbiter, supporting now one, favouring now the other, in order to keep both in line. The overall effect of absolutism was a combined one of extending the embattled life of the feudal mode of production while simultaneously providing the material conditions for the birth of the capitalist mode of production. Absolutism was thus essentially a politics of transition, corresponding to the historic transition from petty to generalized commodity production.

The impact of absolutism on crime and punishment was radical. Notoriously, the absolutist state defined crime as an attack upon its sovereignty, and declared punishment to be its exclusive competence. Absolutism thus ‘de-privatized’ the criminal law. Criminal justice became an affair of state. And the medieval regime of composition had to give way to state punishment, administered by the king’s men. The two passages below give a sense of the disintegrating impact which the statism of the absolutist epoch had upon the notion of composition:

‘The idea of damage done to the individual was merged and lost in the greater trespass alleged to have been committed by the offender against the peace and the code of the king.’<sup>165</sup>

‘With the growth of this conception of crime as an offense against the public welfare, as exemplified in the majesty of the king, there was a corresponding decline in the principle of compensation, which ultimately became obsolete.’<sup>166</sup>

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164 Draper (1977: 477). See also Engels *op cit* 196.

165 Caldwell (1965: 491-2). See also Haynes *op cit* 210.

166 Barnes & Teeters (1959: 288).

The absolutist state thus moved criminal justice definitively into the public arena. Crimes were reinvented as affronts to the 'king's peace' and punishments were imposed and executed by functionaries of the centralized state.

Initially, it appears, the monarch simply stepped into the shoes of the victim. That is, compensation which would have been due to the victim was replaced by fines due to the Crown. Indeed, the system of fines became an important source of revenue for cash-strapped monarchs.<sup>167</sup> In thirteenth-century England 'money collected from fines was equal to one-sixth of the king's revenue'.<sup>168</sup> However, as the power and liquidity of the Crown grew, so did its reliance upon the fine system for revenue recede. Although the fine continued as a criminal sanction, it was rapidly supplanted by a host of physical punishments, infamous for their arbitrary nature and their brutality.

By the fifteenth century, when absolutism reigned supreme, criminal sanctions had become primarily physical, and composition had been relegated to penological insignificance. Thus, Wright comments that:

'If, earlier, compensation to the victim had been superseded by fines to the Crown, the latter now gave way to deterrence and retribution in the form of physical punishments, commonly hanging or beheading.'<sup>169</sup>

The absolutist state, despite its historical transitoriness, thus presided over a sweeping re-definition of crime and a fundamental transformation of punishment. The absolutist state took the historic step of establishing itself as the functional

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167 See Haynes op cit 209-210.

168 Wright op cit 4.

169 Ibid 5. See Foucault (1977: 3-72) for an engaging study of the power relations underlying the brutalities of punishment in pre-revolutionary France.

axis of criminal justice. It was during this period that the state became a surrogate for the crime victim who, in turn, 'became the Cinderella of the criminal law'.<sup>170</sup>

The absolutist break with the feudal tradition of composition was encouraged, if not prompted, by the emergence of 'vagrancy and beggary as a mass phenomenon'.<sup>171</sup> The growth of the money economy of the cities and the concomitant break-up of the natural economy of the *latifundia* led to the pauperization of large numbers of serfs and peasants. Many were forcibly ejected from the land by feudal lords; others sought refuge from feudal exploitation and access to the perceived benefits of the money economy in the cities. But these recently 'liberated' people exceeded by far the number that could be absorbed into the productive life of the cities. The bulk of them became 'surplus people' who formed a stratum of unemployed and unemployable urban poor, languishing in medieval slums.<sup>172</sup> Dislocated and disaffected, they were ready material for the lures of criminality.

'They were turned en masse into beggars, robbers, vagrants, partly from inclination, but in most cases from force of circumstance.'<sup>173</sup>

Thus was born the so-called criminal class, a class of people for whom there was no place on the land or in the cities and for whom crime was often, literally, the only way to keep alive.

This period witnessed an unprecedented leap in the crime rate. Criminality mushroomed, to levels unheard of in any previous epoch of human history. As a systemic feudal response to crime, composition required two conditions: firstly, a low level of crime; and secondly, criminals who had the wherewithal, personally

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170 Schafer (1960: 8).

171 Vermes op cit 55.

172 See Mehring op cit 3-4.

173 Vermes op cit 55.



or by lineage, to compose their offences.<sup>174</sup> The material conditions which fostered the emergence of absolutism also facilitated the demise of the system of composition by destroying its necessary preconditions. As a system, composition was ill-prepared to manage the flood of offences committed by a pauperized criminal stratum. The quantitative leap in criminality was so great as to necessitate a qualitative change in the nature of criminal justice. Composition had to give way to state punishment.

Historically, the extent of a society's reliance upon composition as a sanction is an index of the penetration of commodity relations into the socio-cultural life of that society. In other words, the growth of composition can be superimposed onto the development of commodity relations in the system of production. Through the ages, movement from the *talio* to composition was the juridical expression of the progressive commodification of social relations. That movement reached its apogee in the classical feudal era, when composition held sway as the generalized mode of disposition of crimes. During the period of absolutism, however, that movement was definitively halted, arguably even reversed. The period which nurtured the preconditions of the capitalist mode of production and which prefigured the transition from petty to generalized commodity production was also the period which jettisoned composition.

Absolutism was, essentially, the political response to the extended crisis of the feudal mode of production. It was feudalism on the threshold of its death agony. It was the epoch of the break-up of the natural economy. It was a period of turmoil and dislocation, of political violence and social distress. There was no place for composition here. The penal flagship of classical feudalism ran aground

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174 These requirements follow directly from the class nature of medieval composition.

in the treacherous waters of late feudalism. Nefariously savage punishments replaced composition. Brutality in punishment was the necessary juridical corollary of absolutism in politics. There was a complete correspondence between absolutist penology and the violence of the socio-economic transformation then in progress.<sup>175</sup> Absolutism in fact resurrected a version of pre-talionic blood revenge, that is, an indiscriminate vengeance that was not governed by the talionic principle of equivalence. The absolutist state took the place of the victim-commune and imposed upon the offender a punishment which was typically hugely disproportionate to the crime.

## 2.16 The Rise of the Capitalist Mode of Production

Composition, which had for so long been the measure of the commodification of social relations of production, had to be sacrificed in order to ensure the final victory the commodity. The world-historical transition from natural to market economy, from feudalism to capitalism, signalled the final demise of composition as a system. Unlike all its predecessors, which, at best, sustained various levels of petty commodity production, the capitalist mode of production is a mode structured by generalized commodity production. The entire production process is geared, from start to finish, to the production of commodities. The commodity is the elemental cell of capitalist production. Exchange-value is the *raison d'être* of the production process.

Capitalism is a mode of production which entails, in Wallerstein's pithy formulation, 'the commodification of everything',<sup>176</sup> including labour-power, the unique value-producing commodity. Everything has an exchange-value which is

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175 The process of proletarianization was the most violent aspect of this transformation.

176 This is the title of the first chapter in Wallerstein (1993).

determined in relation to the universal equivalent, money. Yet the capitalist state has, from its inception, eschewed composition as a generalized penological option, despite its historical consonance with the process of commodification. It has, instead, elected to keep alive the public conception of crime and punishment developed by the absolutist state, modified by the enlightenment principle of legality and a clearly discernible talionic posture. England is paradigmatic here.

## 2.17 Corporal and Capital Punishment

The early capitalist state appropriated the pre-talionic penal practices of the absolutist state lock, stock and barrel. The era of primitive capitalist accumulation was also the era of savage punishments for criminal offences. Imprisonment had not yet been invented as a general criminal sanction. Punishments were thus invariably corporal or, distressingly often, capital. They were:

‘cruel and of exaggerated severity, ranging from burning alive or breaking on the wheel to the galleys and many forms of mutilation, whipping, branding and the pillory’.<sup>177</sup>

The death sentence was imposed routinely for even the most petty of crimes. The early English capitalist state had an almost affectionate affinity, which lasted well into the nineteenth century, for the death sentence as its punishment of choice. According to Vermes, by 1820 England had at least 200 capital statutes which prescribed the death penalty as the punishment for 6789 offences.<sup>178</sup>

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177 Radzinowicz (1966: 3).

178 Vermes op cit 56. See also Hay (1975: 18) and Diamond (1951: 322-323). Bresler (op cit 32) gives a graphic sense of the early capitalist penchant for capital punishment: ‘If a man injured Westminster Bridge, he was hanged. If he appeared disguised on a public road, he was hanged. If he cut down young trees; if he shot rabbits; if he stole property valued at five shillings; if he stole anything at all from a bleach field; if he wrote threatening letters to extort money; if he returned prematurely from transportation; for any of these offences he was immediately hanged.’

The early and singularly violent texture of the criminal law in the home of the capitalist mode of production was determined by the exigencies of the appropriation of ownership of the means of production by the rising capitalist class. The new proprietary regime had to be guaranteed, and any opposition from or rebellion by the recently expropriated, however episodic, had to be crushed. The new proletariat had to be taught that resistance to the capitalist project was futile and that, in the world of the commodity, capitalist ownership of the means of production was inviolable. In this era there was no doubt that the law was the handmaiden of capitalist class terror against the proletarian masses. This was the era of bourgeois revolutionariness, of the forceful separation of the direct producers from the means of production, an era which was inequitable to its core, and which left no margin for the equivalent niceties of composition. The latter did not accord with the tumult which marked the social relations of production of early capitalism.

## **2.18 The Political Economy of the Prison**

Theoretically, mature capitalism could have resurrected composition as a generalized system of punishment. Indeed, it should have commodified punishment more thoroughly than even feudalism had. Such a development would have been fully consistent with the idea of capitalism as a generalized system of commodity production. It did not occur. And the reason therefor, it appears, is that mature capitalism invented a system of punishment which had an even better fit with its relations of production, namely, imprisonment. From the mid-nineteenth century imprisonment became the standard capitalist means of dispensing criminal justice. The material roots of this development are to be found in the nature of commodity relations, and more particularly in the nature of that most unique of commodities, labour-power. The capitalist mode of production is predicated upon the constant sale of labour-power by the proletariat

to the bourgeoisie. This sale is the ultimate source of all surplus value, and hence of the extended reproduction of the mode of production. In other words, the economic foundation of the capitalist system is to be found in the sale and purchase of labour-power, the only commodity capable of creating value.

The legal form of this elemental capitalist transaction is the contract of employment, in terms of which the worker sells his labour-power to the capitalist for a given period of time, in exchange for a wage. The capitalist economy is thus an economy of labour time. By selling their labour-power, the workers put it at the disposal of the capitalists for a predetermined time, during which time the workers are put to task producing commodities. Hence the value of each and every commodity emerging from the capitalist production process is determined by the amount of socially necessary labour-time that was required to produce it. This is the law of value, the so-called labour theory of value.<sup>179</sup>

The law of value thus defines value in terms of abstract labour time. The value of every commodity, as Marx tells us, 'represents human labour in the abstract, the expenditure of human labour in general'.<sup>180</sup> Value is a relation which embodies the essentialia of capitalist social relations of production. It is the signature relation of the political economy of capitalism. It percolates throughout the social fabric and leaves its impress on all superstructural relations. There is little in the capitalist universe that is not structured, in one way or another, by the value relation. Certainly, in the current postmodern incarnation of capitalism, the domination of daily life by the law of value is relentless and complete.

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179 Mandel (1979: 17-18) explains that 'the exchange value of a commodity is determined by the quantity of labour necessary to produce it. The quantity of labor is measured by the length of time it takes to produce the commodity.'

180 Marx (1977: 51).

Imprisonment is the penological analogue of the value relation. It is the law of value juridified. Industrial capitalism found in the prison the best juridical correlate of the commodity. Imprisonment, not composition, was the institution which accomplished the commodification of punishment most thoroughly. It was the form of punishment which accorded most fully with juridical worldview of the new ruling class, the bourgeoisie.<sup>181</sup> Pashukanis elaborates upon the relationship between the rise of the prison and the law of value in capitalist society:

‘Deprivation of freedom, for a period stipulated in the court sentence, is the specific form in which modern, that is to say bourgeois-capitalist, criminal law embodies the principle of equivalent recompense. This form is unconsciously yet deeply linked with the conception of man in the abstract, and abstract human labour measurable in time. It is no coincidence that this form of punishment became established precisely in the nineteenth century, and was considered natural.’<sup>182</sup>

Commodity relations express the exchange of equivalent amounts of abstract human labour; imprisonment of a criminal offender expresses the exchange of an amount of abstract freedom equivalent to the severity of the crime. The affinity between the two, as Pashukanis notes, was natural.<sup>183</sup>

In the pre-capitalist world, composition had been the natural penal accessory of the growth of commodity relations. But pre-capitalist commodity production was petty, and labour-power itself had not yet been transformed into a commodity. All the pre-capitalist class societies were formally unequal societies,

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181 Engels (1990: 598) describes the juridical worldview as ‘the classical one of the bourgeoisie’.

182 Pashukanis op cit 180-181.

183 It is not being suggested here that the bourgeoisie had a grand plan to develop the prison as its penal instrument of choice. Ignatieff’s (1985: 92-95) criticism of this vulgar Marxist position is correct. In many senses, the prison ‘chose’ itself. There was certainly a degree of accident involved in its development. There may also have been significant non-bourgeois, including proletarian, support for the prison, as Ignatieff suggests. However, this does not detract from the fact that there exists an objective correspondence, based on the principle of equivalence, between imprisonment and the commodity form.

legally privileging the non-producers over the producers.<sup>184</sup> We have seen that pre-capitalist composition, although based on the principle of equivalence, was nevertheless overtly biased, in terms of the law, in favour of the ruling classes. Capitalism generalized commodity production and commodified labour-power. It also established formal equality as its primary legal principle: all were possessed of the same basic rights; all were equal before the law. This break with the pre-capitalist pattern of class-determined legal regimes was necessary, demanded by the configuration of the capitalist mode of production. Marx explains:

‘The exchange of commodities of itself implies no other relations of dependence than those which result from its own nature. On this assumption, labour-power can appear upon the market as a commodity, only if, and so far as, its possessor, the individual whose labour-power it is, offers it for sale, or sells it, as a commodity. In order that he may be able to do this, he must have it at his disposal, must be the untrammelled owner of his capacity to labour, i.e., of his person. He and the owner of money meet in the market, and deal with each other as on the basis of equal rights, with this difference alone, that one is buyer, the other seller; both, therefore, equal in the eyes of the law.’<sup>185</sup>

It was thus the nature of capitalist relations of production which determined the contours of the capitalist legal form. The generalization of commodity relations required a legal milieu of equality. The commodification of labour-power brought with it, in Marx’s cutting phrase, ‘a very Eden of the innate rights of man’.<sup>186</sup>

Composition was far too infused with the pre-capitalist credo of inequality to find a home in the new Eden of equality inscribed in the bourgeois worldview. Instead, the capitalist state turned to the prison to punish those who violated its legal prescriptions. Imprisonment was the one form of punishment which fully

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184 These were the hydraulic, slave and feudal societies.

185 Marx (1954: 165).

186 Ibid 172.

recognized the criminal as the 'untrammelled owner' of his freedom.<sup>187</sup> It was the penal institution which expressed most completely the total triumph of commodity relations and the final destruction of the natural economy. Criminals would pay for their crimes with the one currency which all could afford and had access to, namely, freedom, measured in time.

The measure of abstract human labour at the heart of the capitalist economy became the great leveller in the criminal justice system. The prison banished the class inequalities which had marked pre-capitalist composition. Capitalist legality was necessarily egalitarian. All were and were required to be equal before the law. And all who broke the law would be subject to a form of punishment which was egalitarian. In other words, capitalism transformed crime, too, into an equal exchange relation. The convicted criminal would, perforce, have to exchange his offence and the damage he had caused for a specified period of his existence in a prison. Like everything else, capitalism thoroughly commodified crime and punishment also.

## **2.19 The Abandonment of the Victim**

Today, more than a century after its invention, imprisonment remains the primary and preferred criminal sanction in the capitalist world, a fact which confirms its consonance with the penal requirements of the capitalist mode of production. The prison, of course, has nothing to offer the victim (except, perhaps, the satisfaction of knowing that the offender is being made to pay for the crime). Indeed, it is an oft-made argument amongst victimologists and restorationists that the centralization of the state and the consequent rise of the prison had the effect of relegating the victim to the status of a 'poor relation' in

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<sup>187</sup> This ownership is a structural requirement of the commodity economy.



the criminal law.<sup>188</sup> They bemoan the fact that the redefinition of crime as an attack upon the integrity of the state signalled the death knell of the rights of victims and the pre-modern restorative elements of the criminal sanction. They tell us that the shift to imprisonment as the typical sanction was simultaneously a shift away from the historical restitutionary rights of victims.<sup>189</sup>

In restorationist lore, then, the victim, as an element of the criminal justice process, died with the Middle Ages. The modern state was concerned with the offender; the victim was an unwelcome trespasser, to be ignored, even hidden from the public view.<sup>190</sup> A central aim of the restorationist project is to 'restore' the victim, to rehabilitate him as one of the key components of the criminal justice matrix. The advocates of restorative justice believe that, absent the victim's reinstatement and recognition as a criminal justice agent, the search for a properly restorative sanction, and hence a legitimate criminal justice dispensation, is doomed to failure.

However, the abandonment of the victim was in fact a necessary concomitant of the great socio-economic transformation occurring at the time, namely, the demise of feudalism and the triumph of capitalism. Unlike all its predecessors, the capitalist mode of production has an inherently anti-community

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188 See, for example, Schafer (1977: 16), Walklate op cit 109, Mawby & Gill op cit 36, Karmen op cit 16, Jacobs op cit 47, Van Ness & Strong op cit 10 and Zehr op cit 109-110.

189 See Jacobs *ibid*: 'The connection between restitution and punishment was severed. Restitution to the victim came to play an insignificant role in the administration of the criminal law.'

190 In this regard, Falandysz (1982: 110) makes the important observation that there may have been a class aspect to the desertion of the victim: 'An interesting result emerges when we realize that these "forgotten people" are mostly from the working class - poor, uneducated and generally underprivileged by the existing social system. Isn't it very logical that the same system which "remembers" to punish "the criminals" forgets the victims? Is it by accident only that both criminals and victims belong basically to the same category of people? If the victims were mostly from the ruling and privileged classes of society, could they ever have been forgotten by the criminal justice system of a society which these classes rule and in which they are privileged?'

dimension. Its social relations are premised upon the autonomous individual, for whom community is an encumbrance. In other words, capitalism posits, as its elemental human component, a free and undetermined individual. For such an individual, becoming the victim of a crime is a hazard of autonomy. Victimhood is immanent in the condition of self-determination. It is thus an attribute of the individual, not of the community. The individual owns his status as a victim, and must deal with it as a private matter, like every other feature of his autonomy. That is, in a sense, the price of autonomy, and incursions upon it cannot be constructed in social terms. The atomistic individual must perforce be an atomistic victim. The early capitalist mode of production did not countenance sociality in respect of victimhood. This is also why the victim disappeared from view more or less with the rise of capitalism: it was part of the logic of the system.

Capitalism postulates an exultant individualism as part its ideological arsenal. One of the consequences is an intolerance of victimhood as a legitimate or even valid social category. The victim mentality had no place in the triumphalist chronicle constructed upon the enterprising spirit of the capitalist pioneer. The capitalist notion of personhood had to be unencumbered, also by the notion of victimhood. Hence victims of crime did not merit the kind of attention which they had apparently received in the pre-capitalist world. The new world was organized around the norm of the individual commodity owner, autonomous and equal to every other commodity owner. It comprehended progress in terms of the destruction of all previous conceptions and beliefs. It could thus give no credence to victimhood, a status which was bereft of developmental potential and which, if validated as a social concern, could only be an impediment to progress. Hence, the abandonment of the victim. Hence the focus, instead, upon the offender.

Unlike the victim, the offender had to be given proper attention, for his conduct did more than merely harm the individual victim. It also taxed the integrity of the social relations of production of capitalism. As we have seen, these relations entailed the notion of the rights-bearing autonomous individual so pivotal to liberal bourgeois philosophy. The criminal was, in this connection, the autonomous individual *in extremis*. He had gone beyond the pale and broken the fundamental rule of the commodity economy, namely, equality in exchange. He had, by means foul, engineered an unequal exchange with his victim. He had abused his autonomy and had to pay for his errantry. However, his offence was not a private matter. It was not one for settlement with his victim. For the entire system was his victim. He had breached the social contract. He had partaken of the poisonous fruit of inequality in the 'very Eden of the innate rights of man'. He knows the cost of his transgression. His crime was a public one, and he had to atone for it by yielding to the state a measured portion of his life, equivalent to the damage he had caused.<sup>191</sup>

Capitalism's penal focus upon the offender was thus a necessary concomitant of the architecture of its social relations of production. These relations require formal equality in all things. Hence capitalist personhood implies perfect equality of rights for all. The criminal violates this law of equality and must be made to pay for his crime. In this sense, crime in capitalist society is not so much an attack upon the rights of the victim as it is upon this law of equality whence those rights derive. The net effect of capitalism's approach to crime was the virtual excision of the victim as an attribute of the criminal justice

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<sup>191</sup> See Foucault op cit 89-90: 'The citizen is presumed to have accepted once and for all, with the laws of society the very law by which he may be punished. Thus the criminal appears as a juridically paradoxical being. He has broken the pact, he is therefore the enemy of society as a whole, but he participates in the punishment that is practised upon him. The least crime attacks the whole of society; and the whole of society – including the criminal – is present in the least punishment ... In effect the offence opposes an individual to the entire social body; in order to punish him, society has the right to oppose him in its entirety.'

system. Whereas the pre-capitalist modes of production had all, to a greater or lesser extent, formally acknowledged the actual victim as the legal correlative of the offender, capitalism acknowledged only its own state as surrogate victim. The actual victim became a casualty of a criminal justice system which reserved the benefits of agency for the offender. The victim was relegated to the status of onlooker, constrained to observing a process which concerned his interests directly and which affected him profoundly, but over which he had little influence and no control. Such was the fate of the crime victim for at least the first century of the life of the capitalist mode of production.

## 2.20 The Rediscovery of the Victim

It is generally accepted that the victim was 'rediscovered' in the decade immediately following the Second World War.<sup>192</sup> Essentially this meant that a number of criminologists and other criminal justice professionals launched a campaign to reinstate the victim as a legitimate component of the criminal justice system. They argued that the rights and interests of the victim of a crime mattered at least as much as those of the offender, and hence that the system ought to take them seriously. They contended that for too long the victim had been sidelined, despite being an obvious and indispensable aspect of the crime question.<sup>193</sup> Victims and their families suffered, often severely, as a result of the conduct of the offender. They did not break the law, and did not deserve to be treated as an unwelcome intruder in the dispute between the offender and the state.

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192 See Walklate op cit xi.

193 The acknowledged leader in this regard was Margery Fry, whose life's work was devoted to the cause of the crime victim and to winning recognition for victimhood as a compensable social category. Her *Arms of the Law* (1951) remains a victimological classic. See Walklate ibid 109.

This pro-victim campaign had at least three consequences of significance. Firstly, it spawned the branch of criminology which we know as victimology; secondly, it led to a number of countries introducing some form of victim compensation arrangements in terms of which victims who met the prescribed criteria were legally entitled to be compensated for the injuries they had suffered at the hands of the offender;<sup>194</sup> thirdly, it has in the last two decades or so, provided fertile ground for the growth of the restorative justice movement. These are important developments, which have had a major positive impact upon the way in which the criminal justice system comprehends and treats victims of crime. The victim has been rescued from legal obscurity and, to some extent at least, has been rehabilitated as agent in the criminal justice process. Capitalism, which abhors victimhood, has at last allowed the victim a voice.

## 2.21 Capitalism in Crisis

The historical and material backdrop to this rebirth of the victim is familiar. By the end of the Second World War the capitalist mode of production had been in crisis for at least half a century, as a result of the deepening contradiction between its relations and forces of production. This contradiction triggered regular socio-economic and political explosions, including the imperialist 'scramble for Africa', the First World War, the great depression, the rise of fascism, the Spanish Civil War and the Second World War. All of these put tremendous strain upon the class dictatorship of the bourgeoisie and undermined its ability to rule as it had before, arrogantly and self-indulgently.

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194 See, for example, Walklate *ibid* 113-126, Maguire & Shapland (1990: 212-219) and Williams (1999: 10-13).

There was also the ‘spectre of communism’. Since the Bolshevik Revolution in 1917, there had come into existence a practical modern alternative to the capitalist system. By the end of the Second World War a number of Eastern European countries had followed the USSR, albeit now in the thrall of the Stalinist thermidor. There were strong communist parties in most capitalist countries. The anti-colonial revolution in the Third World had begun, and often took on a strong anti-capitalist posture. And by the start of the fifties, the Chinese revolution had expanded the post-capitalist world considerably. There was the real danger that the international proletariat, inspired by the Bolshevik Revolution, was becoming a class-for-itself and, hence, a threat to the very existence of the capitalist mode of production.

Capitalism was in crisis. In order to survive it had to be restructured. The bourgeoisie’s primary response began at Bretton Woods in New Hampshire, USA in 1944, when some 40 capitalist countries met to restructure the international capitalist economy. Bretton Woods was a concerted capitalist effort to solve the structural crisis besetting the capitalist mode of production. Its most important immediate results were the establishment of the International Monetary Fund and the World Bank,<sup>195</sup> the acceptance of the US dollar as a currency which was ‘as good as gold’ and, hence, the emergence of the USA as the undisputed leader of the capitalist world. These arrangements were all geared to stimulating the international capitalist economy. They succeeded in generating a relatively long, if artificial, post-war boom. For at least two decades after the Second World War, capitalism was able to avoid a major slump.

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<sup>195</sup> Galbraith (1995: 174) describes the functions of the World Bank and IMF as follows: ‘The first was to provide the money for investment in the hard plant of economic development; the second, more diverse and less specific in its tasks, would help countries, new and old, to overcome the deficit in their balance of payments ... and specify the internal economies and discipline that, with prayer and hope, would correct imbalance.’

## 2.22 Welfare Capitalism

The bourgeoisie was also able to disarm the militant proletariat by accepting the need to introduce a welfare dimension into its class hegemony. In the post-war era, many capitalist countries introduced social legislation aimed directly at removing that atmosphere of hostility to capitalism which prevailed amongst most people outside the ranks of the bourgeoisie.<sup>196</sup> Welfarism was the bourgeoisie's response to the popular conviction that it was dispensable as a class.

The British welfare state exemplified this approach to public and especially proletarian disenchantment with capitalism. Laski explains:

'Social legislation is not the outcome of a rational and objective willing of the common good by all members of the community alike; it is the price paid for those legal principles which secure the predominance of the owners of property. It waxes and wanes in terms of their prosperity. It is a body of concession offered to avert a decisive challenge to the principles by which their authority is maintained.'<sup>197</sup>

Welfare capitalism was thus a direct response to the strength of proletarian opposition to capitalist rule. It was the price paid by the bourgeoisie to defeat the proletarian threat to its dictatorship.<sup>198</sup> It was, according to Miliband:

'part of the "ransom" the working classes had been able to exact from their rulers in the course of a hundred years. But it did not, for all its importance, constitute any threat to the existing system of power and privilege. What it did constitute was a certain humanisation of the *existing* social order.'<sup>199</sup>

196 See Schumpeter (1979: 63) whose book was first published in 1943: 'The public mind has by now so thoroughly grown out of humor with it as to make condemnation of capitalism and all its works a foregone conclusion - almost a requirement of the etiquette of discussion. Whatever his political preference, every writer or speaker hastens to conform to this code and to emphasize his critical attitude, his freedom from "complacency", his belief in the inadequacies of the capitalist achievement, his aversion to capitalist and his sympathy with anti-capitalist interests.'

197 Cited in George & Wilding (1976: 99).

198 See George & Wilding *ibid* 100 and Miliband (1980: 99).

199 Miliband *ibid*, original emphasis.

Welfare capitalism thus entailed bourgeois cognition of the growth of proletarian organization and solidarity, and an admission that the working class was a crucial agent in the life - and death - of the capitalist mode of production. It was an attempt by the bourgeoisie to soften the violence of capitalist exploitation, to give the system a human face, and hence to find a *modus vivendi* with its class enemy.

One aspect of the welfare 'ransom' paid by the bourgeoisie after the Second World War was, as already intimated, the 'rebirth' of the crime victim. Welfare capitalism provided the material milieu for the development of victimology. Its humanizing project included space for a positive construction of victimhood.<sup>200</sup> Most of the victims of crime were also, by virtue of their class position, victims of capitalist exploitation. The new welfare capitalism would acknowledge their status as victims of crime as part of the cost of perpetuating their status as victims of exploitation. It was in this context that victimhood in the criminal law could be affirmed as a status deserving of concern and compassion. The crime victim was once again put on the agenda, and acknowledged as an essential element of the criminal justice system. The earlier negative conception of victimhood was, under the influence of the proselytizing victimologists, replaced by a more positive notion of the victim as a rights-bearer and thus worthy of protection.

The restorative justice movement is a natural extension of victimology. But it is also an attempt to move beyond victimology, to a penology which is centred upon healing all the effects of crime. Restorative justice is, in this regard, the most inclusive of all contemporary approaches to crime and punishment. It endows both offender and victim with agency, but an agency which is fundamentally social.

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200 See Mawby & Walklate (1994: 72).



In this regard, it harks back to pre-capitalist penal practices. However, it is a response to late capitalist conditions. Restorative justice emerged some 25 years ago, after the bubble of the post-war boom had burst. By the early 1970s the international capitalist system was once again in serious and open crisis. The contradiction between capitalist relations and forces of production, long concealed by the post-war prosperity based on the Bretton Woods system, asserted itself more acutely and starkly than ever before. The capitalist mode of production was in dire straits, and the atmosphere of hostility which it experienced in the 1930s and 1940s returned with a vengeance.

### **2.23 Privatization and Popular Capitalism**

A new approach was needed if capitalism was to survive. Hence the late 1970s and the 1980s witnessed the birth of another project in capitalist reconstruction. The watchword of this process was privatization. In an attempt to counter increasing downward pressures on the rate of profit, the bourgeoisie turned its back on welfare capitalism and embraced popular capitalism in its stead. The precepts of popular capitalism were formulated with a view to giving all citizens a material stake in the mode of production. It entailed the dismantling of most of the components of the welfare state and the steady repeal of social legislation. State assets were sold off to private capitalist consortia. Ordinary working people were assured by capitalist ideologues that they too could enjoy a slice of the profit pie and were lured by opportunities to invest in the economies of their countries via the equity market. The idea was to free the economy from state interference and control, and thereby to prove that capitalism was a dynamic system which could bring good fortune to all who embraced its values.<sup>201</sup>

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201 For a detailed exposition of the tenets of popular capitalism see Redwood (1989: 24-45).

Capitalism was no longer only for the capitalists. It was for everybody. It was a people's mode of production, and all people could profit by investing in it. Welfare capitalism had enabled the state, which had now become a hindrance to capitalist progress. Popular capitalism wished to liberate the market from the strictures of state control. The free market was the key to prosperity. The wider the process of commodification, the more opportunity there would be for avoiding crises and promoting growth. Hence privatization. Hence the celebration of the market as the great leveller. Hence the enthusiasm for entrepreneurship and free enterprise.

Of course, popular capitalism meant serious cutbacks in the hard-won social rights of the workers. But, they were told, every worker now had the right to break free of a life of dependence upon and charity from the state, and to discover his true worth in the heady atmosphere of the free market. Popular capitalism was proffered by its ideologues as the solution to the structural crisis of and proletarian disaffection with the mode of production. It promised to sideline the class struggle and to transform every citizen into a property owner, motivated by the ideals of individual incentive and self-promotion, and dedicated to making capitalism work. Popular capitalism was, in this regard, an attempt to replace classes with consumers.<sup>202</sup>

The primary target of the popular capitalist ideologue was the state. It was argued that capitalism was in trouble because of too much state interference in its operations. State control was hampering the working and development of the market and had to be resisted. Such resistance had to be popular: all of us could fight the disabling state; all of us stood to gain from privatization and liberalization. The problem with capitalism was, according to the popular

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202 See Mawby & Walklate op cit 80-86.

capitalists, not structural but conjunctural, deriving from the overbearing presence of the state in affairs which ought to be private. The state was an undesirable interloper and had to be expelled from the relations between private commodity owners. The assault upon the state was, in reality, an assault upon the range of social rights which the proletariat had won in the form of welfare capitalism. But that was a point effectively sidelined by the euphoria of the promises of the spirit of free enterprise. The key to prosperity was not in class solidarity but in individual achievement. The possibility of a better life lay in a private, not a social, future. People could make their own futures, without the help from or interference of the state. Such were the pledges of popular capitalism: it was not an elitist system; it could uplift the masses.

The intellectual origins of restorative justice are to be found in the postulates of popular capitalism. Restorative justice is in many respects the penological equivalent of popular capitalism. The correspondence between the two is remarkable. Restorative justice emerged at virtually the same time as the popular capitalist programme was being implemented. Like the popular capitalists, the restorationists too decried the state as an interloper. They proposed a criminal justice system which was founded upon the relationship between offender and victim, as private citizens. In the same way as popular capitalism advocated the privatization of state assets, so restorative justice agitated for the privatization of crime. The state-managed criminal justice system had failed demonstrably to solve the problem of crime. The post-war rehabilitation of the victim had been a major step forward but had made no perceptible contribution to the solution. The weight of the state had hampered the free development of the capitalist market; the presence of the state in the criminal justice system was obstructing the development of a solution to the crisis of criminality. Like the popular capitalists, the restorationists began their campaign with an attack upon the role of the state.

This was the motif of Christie's now famous 1976 Foundation Lecture of the Centre of Criminological Studies at the University of Sheffield, in which he argued that crimes are private conflicts which the state has appropriated from the individuals involved.<sup>203</sup> Christie's thesis is at the heart of the theory of restorative justice. The restorationist movement is committed to ousting the state from its position as arbiter and interloper, and to reclaiming crimes as the property of the offender and victim, to be resolved according to restorative principles. Restorative justice is thus crucially about extending and applying the premises of popular capitalism to criminal justice. The coincidence between the two about the state and its role is virtually complete: both view the state as an obstruction to progress which has to be removed; both seek to base their respective projects upon the individual as property owner.

There are, of course, important differences between popular capitalism and restorative justice which need to be noted. Popular capitalism was concerned to guarantee the existence of capitalism as a mode of production. Its rejection of large-scale state involvement in the economy was ultimately aimed at revitalizing the capitalist economy and, thereby, protecting the integrity of the capitalist state. However, it did not question the non-economic role of the state and certainly did not contemplate a privatized criminal justice system. If anything, popular capitalism envisaged a criminal justice system in which the state was much more active than before, as it strove to improve the levels of delivery to consumers of its services.<sup>204</sup> The proponents of restorative justice, by contrast, were concerned to construct a criminal justice system which did not bear the imprint of state influence. They took seriously the notion that crime was a private matter, to be

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203 The lecture was published in 1977 as an article titled '*Conflicts as Property*' and, although it contained no express reference to restorative justice, has since acquired the status of a theoretical classic of the restorative justice movement.

204 See Mawby & Walklate op cit 84.

dealt with by the parties involved, without state interference. And whereas popular capitalist penology remained heavily statist in all its essentials, restorative justice aspired to a way of doing justice which was fundamentally non-statist.

Their differences notwithstanding, restorative justice is a juridical aspect of the ideology of popular capitalism. Both were born of the structural crisis of the capitalist mode of production which exploded in the 1970s. The one was a campaign to solve the economic crisis of capitalism. The other was a project to find a way out of its crisis of criminality. Both elected privatization as the mast upon which to nail their colours. In the case of restorative justice, privatization entailed the resurrection of the notion of composition, which had flowered briefly in medieval times, only to be demolished in the age of absolutism. The restorative sanction is the latter-day rendering of the composition of criminal offences. It is about repairing the harm occasioned by the crime, albeit not according to so patently proprietary a morality as historical composition. The evolution of pre-capitalist systems of composition had all been linked to the level of the development of petty commodity production within the natural economy. Restorative justice is the culmination of this movement, in the conditions of generalized commodity production of late capitalism. It represents, as I shall argue later, the historical apogee of the commodification of legal relations.<sup>205</sup> And since the commodity is the exemplification of the capitalist property regime, restorative justice is as deeply proprietary as historical composition. Restorative justice is, in this connection, composition modernized or, more accurately, postmodernized.<sup>206</sup>

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205 See Chapter Five below.

206 See Chapter Six below.

## 2.24 Conclusion

This survey of the history of the institution of composition has shown that, despite the assertions of its advocates, the historical roots of restorative justice do not go very deep. Composition is essentially an institution of historical society, that is, class society, which is some 5000 years old at most. All of human existence before that was classless. Our prehistoric ancestors could not have enlisted composition as their principal response to wrongdoing simply because they did not possess the material means of doing so. Instead, their justice was initially the justice of blood revenge, later that of the *lex talionis*. Composition emerged only after the Neolithic Revolution, and grew as commodity production grew. It was the *lex talionis* commodified. There is thus not so great an opposition between retribution and restoration as restorationists would suppose or have us believe. Retribution is governed by the law equivalent retaliation or requital. Restorative justice is but the primitive law of retaliation infused with the spirit of that most pivotal element of property, the commodity. It is the civilized version of the *talio*.

What is more, composition was from the beginning of its existence overlaid with the inequalities of social class. Although it may have been formally available to all, in practice it always favoured the rulers against the ruled. It was, in other words, from its inception an institution which expressed class rule and which operated to protect upper-class offenders from the unpleasant punishments which lower-class offenders had to endure because they could not afford to 'pay' for their crimes. There is thus little in the history of composition upon which restorationists can legitimately rely. Rather, that history reveals a clear and unflattering connection between composition, on the one hand, and class rule and commodification, on the other.

This chapter has attempted to provide a Marxist treatment of the historical claims of restorative justice. The next chapter will attempt to do the same for its contemporary claims.

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## CHAPTER THREE

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### Chapter Three: The Claims of Restorative Justice

The contemporary claims of restorative justice are large. They summate in the proposition that restorative justice is the antithesis of criminal justice. Given the hegemonic status of criminal justice in the modern era, this proposition is one of considerable moment. It delineates restorative justice as a way of doing justice which circumvents the 'penal harm' embedded in criminal justice.<sup>1</sup> Like its historical claims,<sup>2</sup> the contemporary claims of restorative justice too are constructed in opposition to retribution, as the exemplification of criminal justice.<sup>3</sup>

The purpose of this confrontation is to establish that, as a deliberative response to criminal conduct, restoration is superior to retribution. Its advocates are unanimous that restorative justice constitutes a more enlightened approach to the problem of criminality than retributive justice, and hence enjoys better prospects of resolving it. There is a discernible confidence within restorationist ranks that restorative justice will succeed in finding a solution to the ills which have rendered our criminal justice system more or less impotent in the face of the one of the biggest international crime waves in human history.

However, as suggested in the sentence above, the claims of restorative justice are not confined to devising non-punitive dispositions. Restoration aspires to such higher ideals as healing, peacemaking, social reconstruction and the like. The restorative experience is supposed to be a life-changing one for participants. It is supposed to be transcendent, and to make possible the emergence of a

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1 See Levrant *et al* (1999: 3-4).

2 See Chapter Two above.

3 See Levrant *et al* *op cit* 4. This opposition is reflected in the structure of Consedine's (1999) book which consists of only two sections headed 'Retributive Justice' and 'Restorative Justice'. The opposition is also the major theme in Zehr's (1995) argument for 'changing lenses'.

community of equals governed by mutuality and respect. Restorative justice is thus not merely concerned to be a better way of doing justice. It also imagines a better way of living for all within its purview.<sup>4</sup> Levrant *et al* refer to this as the benevolence of restorative justice:

‘It broadens the focus of justice from offender-oriented penal harm to community-oriented peacemaking and only considers justice to be achieved when the suffering of offenders, victims, and communities has ended and crime has been reduced.’<sup>5</sup>

This is ‘the seductive vision of restorative justice’.<sup>6</sup> It comes with its own ‘benevolent rhetoric’.<sup>7</sup> And it amplifies the claims of restorative justice considerably.

### 3.1 Privatizing Criminal Justice

The restorationist movement contends (as it has to) that it can solve the crisis of criminality, the magnitude and complexity of which have been the undoing of all its predecessors. This self-belief is not feigned, nor is it the bravado of the tyro. It is founded in the core theoretical postulate of restorative justice, namely, the privatization of the criminal episode. Here restorative justice is radical, in the true sense of the word, that is, it goes to the root of the crime problem. It is radical because it ‘moves away from a state-centred definition of crime’,<sup>8</sup> contemplates a ‘transfer of power from the state’<sup>9</sup> and re-conceptualizes the criminal episode as a private matter. It is not concerned with the conviction and punishment of offenders. It is concerned to analyse and respond to the criminal episode for what it really is: a private conflict between individuals which

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4 See, for example, Consedine & Bowen (1999: 12), who hold that restorative justice ‘creates opportunities for better human interaction, for the healing of wounds’.

5 Levrant *et al* op cit 6.

6 Acorn (2004: 1).

7 Levrant *et al* op cit 22.

8 Ibid 5.

9 Takagi & Shank (2004: 151).

has disturbed the relations of community within the affected segment of the population. The essential task of restorative justice is to mend those relations, without the intrusion of the ultimately violent resources of the state.<sup>10</sup>

Restorative justice is the first general theory of criminal justice expressly to posit a privatized notion of crime and sanctioning. All its predecessors took for granted the central role of the state in the criminal justice system. There were, to be sure, persistent, often perspicacious, critiques of the nature of the state's involvement and its impact especially upon the interests of the victims of crime.<sup>11</sup> However, the right of the state to occupy its central position in the system was seldom, if ever, an issue for debate. Before the advent of the restorative justice movement, it was generally accepted amongst criminologists that criminal justice was essentially state justice, that is, justice administered and dispensed by specialized agencies of the state.<sup>12</sup>

The restorationists are engaged in a re-definition of the criminal justice landscape. The crux of this project is their position on the role of the state. All the other propositions of restorative justice follow from or are directly dependent upon this central axiom. For the restorationists, the state is *the* problem of the criminal justice system. They posit that the crisis in which the system is foundering is in no small part directly attributable to the dominant role of the state and its apparatuses. It is, in other words, precisely the statist texture of the modern criminal justice system which is the fundamental source of the crisis. The

10 Privatization is the direct implication of Christie's (1977) theorization of criminal conflicts as forms of property. See Tshehla (2004: 4): 'One attribute of restorative justice especially its radical version is that it would take the case out of the public (*sic*) and make it a private matter between the individuals involved.'

11 For example, the victims' movement and the informal justice movement both developed, in part, in response to the perceived failures or inadequacies of state justice.

12 See Braithwaite (2003a: 62) who lists 'central state control' as one of key elements of criminal justice that has 'globalized almost totally during the past two centuries'.

*raison d'être* of the restorationist project is thus to reconstruct the criminal justice system by dethroning the state as principal protagonist and foregrounding the actual parties to a crime, that is, the victim, the offender and the affected community.<sup>13</sup>

The restorative justice movement thus rests upon a postulate which is but seldom expressly acknowledged, namely, that the state does not have a legitimate interest in crime and punishment *as a party* and hence has no right to sovereignty over the criminal justice system. It is this postulate that underlies the restorationist project to privatize the criminal episode. The proponents of restorative justice believe that the state, as a public institution, has no place in, indeed, no right to intervene in a relationship which, although conflictual, is fundamentally private. In other words, restorative justice is constructed upon an essentially anti-statist theoretical premise.<sup>14</sup>

The proposal to excise the state from the criminal justice process is a truly radical one. Indeed, it is arguably a revolutionary aspiration. From being the primary agent in the adjudicative process, the restorationists seek to relegate the state to the position of no more than facilitator and resource provider. The state is the quintessential coercive institution of our times. By their anti-statist posture, the restorationists are declaring that a successful criminal justice system must be a

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13 See Zehr & Mika (1998: 51). Note that the adherents of partial restorative justice share this reconstructionist ambition, at least in respect of those segments of the criminal justice system ceded to the restorationist project by the state.

14 Braithwaite (op cit 62) notes that 'restorative justice theorists see most ... elements of the central state takeover of criminal justice as retrograde'. See also Bowen (1999: 18): 'Restorative justice seeks to redefine crime, interpreting it not so much as breaking the law, or offending against the state, but as an injury or wrongdoing to another person or persons. The offender and victim are encouraged to be directly involved in airing the issues surrounding the conflict through dialogue and negotiation, in the presence of the offender's family and the victim's support people. Those involved in the conflict are empowered to become central to its understanding and eventual resolution.'

non-coercive one. State punishment is backed, ultimately, by state violence.<sup>15</sup>

The restorationists are positing that the restorative sanction is fundamentally non-violent. All in all, the restorative justice movement is arguing that true justice has to be private justice and that the state is an obstacle to the attainment of true justice.<sup>16</sup>

Restorative justice in its comprehensive version is thus a radical alternative to the formal criminal justice system as we know it. It is this paradigmatic claim which makes comprehensive restorative justice philosophically interesting and theoretically valuable. It is not just another scheme to re-arrange the established institutions of criminal justice or to re-configure the existing distribution of financial and human resources. Nor is it an attempt to construct yet another justification for state punishment. The restorationist project aspires to transcend the state and, hence, also punishment. It is about re-defining crime and criminal justice without any reference to the state and its adjudicative institutions.

For restorationists, the intrusion of the state has compromised the integrity of the criminal justice process. They argue that the historical locus of criminal justice is the realm of the private. It is the modern state which has chosen to present itself as attribute of the criminal justice system.<sup>17</sup> By its trespass it has violated the historical naturalness of a private system of criminal justice. The

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15 See Cragg (1992: 91).

16 The idea is that 'ownership' of the criminal episode and its resolution no longer vest in the state. Such 'ownership' is transferred to the parties directly affected by the episode. See McCold (2001: 41): 'Restorative justice processes, in their purest form, involve victims and their offenders in face-to-face meetings and it is these participants (along with their respective communities of care) who determine how best to deal with the offence.' See also Carey (2001: 152) who argues that 'the criminal/juvenile justice system must recognize crime as an interpersonal conflict (i.e., a conflict between individuals as opposed to involving a more abstract party such as the state).'

17 The development of restorative justice has coincided more or less with the emergence of the postmodern state, that is, a state which is typically minimalist and which promotes the privatization of traditionally public functions. See Chapter Six below.

contemporary crisis of criminality is a direct result of this state intrusion. The obvious and necessary response is thus to eject the state and to re-privatize the entire system. In other words, restorative justice proposes the de-statization of criminal justice, a development which is supposed to take us 'beyond the punitive society' into the brave new world of the restorative sanction.

Comprehensive restorative justice thus proceeds from a privatized definition of crime and an anti-statist notion of criminal justice. This is its founding precept, and all its tenets derive in one way or another from this precept. Five main tenets of restorative justice emerge from the literature. These are the restorative sanction, the restorative process, the empowerment of the victim, the reconstruction of the offender, and community participation. This list is, of course, not exhaustive. Also, there is a fair degree of overlap amongst its various items. But collectively they do constitute the essential pillars of the restorative justice movement. Also, together they amount to an umbrella rejection of the precepts of the extant criminal justice system. Each is explicated below. They are then criticized from the Marxist perspective.

### **3.2 The Restorative Sanction**

The restorative sanction is perhaps the single most important tenet of restorative justice. It implies all the others. And it is expressly non-punitive. It thus encapsulates all that is radical about restorative justice. However, the restorative sanction is difficult to define and not easy to analyse. It is an analeptic concept, rather than a specific method of disposition. It has been developed in opposition to state punishment, and is probably best elucidated in relation to its contrary. The features of state punishment are well-known and need not be traversed here in any detail. Suffice it to say that, in its retributive aspect especially, it reduces to a painful relationship between the state and the offender.

State punishment is an essentially compelling response to the destructive behaviour of offender. It is the imposition by the state of its will and, hence, its violence upon the offender.<sup>18</sup>

The restorative sanction is meant to be the antithesis of state punishment. Thus, it rejects the notion of the state as all-purpose victim, and negates the exclusive vinculum which the criminal justice system establishes between the state and the offender. It is concerned to rescue the victim from the powerless obscurity imposed by state justice, and to prevent the offender from becoming a victim of state repression.<sup>19</sup> The restorative sanction is intended to be the outcome of a collaborative effort between the actual victim and the offender. Victim and offender are meant, via the experience of creating the restorative sanction, to become the saving of each other. The sanction is concerned to repair and heal, not to punish.<sup>20</sup> Justice is to be found in the restorative quality of the sanction, and not in any state penal programme.

The primary objective of the restorative sanction is to restore the *status quo ante* for the victim, that is, to return the victim to his or her pre-crime status. The idea is that the sanction should be the means of repairing the harm suffered by the victim and of restoring him to the position he enjoyed before the offence. All in all, the restorative sanction is supposed to express the expunction of the crime and all its consequences.

Of course, there are situations which do not allow for an actual restoration of the *status quo ante*. This is the case where the victim dies or suffers permanent

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18 See Walgrave (2001: 19-20) and Wright (1991: 15-16).

19 See Zehr (2003: 69) who argues that victims have been reduced to 'mere footnotes in the process we call justice' and that offenders experience punishment as 'deeply damaging'.

20 See Van Ness *et al* (2001: 6), Van Ness & Strong (1997: 41-43) and Zehr (1995: 186-187).

physical or mental injury, or where the offender refuses to participate in the restorative encounter or is unable to make good the harm he has caused. But even if it were physically possible always, mere restoration of the *status quo ante* for the victim entails the logical possibility of a repetition of the same criminal episode *ad infinitum*. The restorative sanction must necessarily do more. It must also prevent or, at minimum, contribute to preventing the iteration of the crime. In other words, it should also operate to steer the offender away from crime, back to the law-abiding existence which he presumably led before his transgression. The restorative sanction must therefore have at least two components: firstly, a restorative component in terms of which the victim is restored as far as is possible to his position before the commission of the offence; secondly, a preventive component, aimed at obviating recidivism.<sup>21</sup>

By definition, the restorative sanction is supposed to achieve its aims without reference to or reliance upon the coercive resources of the state. This ideal perforce entails a third component, namely, a community or civil society component. For, absent state involvement, community participation is the only tenable way of developing and implementing the restorative sanction. The healing of the relationship between victim and offender requires the mediation of the community. The restorative sanction achieves legitimacy from the imprimatur of the community. It is the community milieu, as against the apparatuses of the state, which clinches the deal, so to speak, and validates the restorative sanction.<sup>22</sup> The community is the guarantor of victim-offender collaboration. Restorative justice thus depends as much upon community oversight as it does upon the co-operation of the offender and victim. Both victim and offender necessarily exist

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21 See Van Ness & Strong *ibid* 41 & 43, Morris (2003: 467) and Johnstone (2003: 3). See also Levrant *et al* *op cit* 17-22 and Ashworth (2003: 174-175) who are sceptical about the capacity of the restorative sanction to reduce re-offending.

22 See Zehr *op cit* 208.



in community. Both are members of a determinate social complex which constitutes the context of the crime and its implications.<sup>23</sup>

The restorative sanction purports to mend what the crime has fractured by mobilizing the triad of offender, victim and community: the offender is required to take responsibility for his offence and to account therefor to the victim and the community; the victim is positioned as an indispensable agent of the restorative process with a decisive voice in the construction of the sanction and the ultimate resolution of the conflict; and the community becomes the locus of the implementation of the sanction and the overall monitor of the restorative process.<sup>24</sup> I shall deal with the position of each component of this triad individually and in more detail later. At this juncture, suffice it to say that the success of the restorative project rests crucially upon the level of co-operation which the elements of the restorative triad are able to achieve.

### 3.3 The Restorative Process

The tenets of the restorative process have been elaborated in direct opposition to those of conventional criminal procedure.<sup>25</sup> Criminal justice relies upon a highly formalized and formalistic procedural canon which is antagonistic in all its core attributes. Formal criminal procedure is organized around a presumption of basic conflict between the state and the offender. The entire corpus of rules is infused with the spirit of this antagonism. The procedures of restorative justice, by contrast, are self-consciously non-antagonistic, and

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23 See Zehr & Mika op cit 52, Van Ness & Strong op cit 40-41, Marshall (2003: 34-35) and Bowen op cit 19-20.

24 See Marshall ibid 36, Zehr & Mika ibid 77 and McLaughlin *et al* (2003: 7).

25 Criminal procedure refers to the adjectival component of the criminal justice system. This component may be structured according to either adversarial or inquisitorial principles. See Wright op cit 12.

dependent for their efficacy upon the collusion of the participants in the process. The restorative process is non-antagonistic because it is not directly connected to any punitive agenda.<sup>26</sup> Instead, it is directed at facilitating the repair of the relations which the criminal conflict has rent, and with the co-operation of all the affected parties. Restorative justice thus requires procedural precepts which express the conviction, firstly, that offender and victim are not or do not have to remain antipathetic and, secondly, that there can be a rapprochement between the offender and the affected community.<sup>27</sup>

Conventional critics of conventional criminal procedure tend to focus upon the resources available to accused persons. They argue that criminal procedure cannot be fair unless the accused has qualified and - importantly - committed legal representation, which is often not the case. Essentially, these critics take a remedial or corrective approach. They wish to see due process upheld, that is, they wish the criminal trial to be a fair fight between equals.<sup>28</sup> The criminal justice system ought to be resourced and re-aligned in such a way as to vindicate due process. Restorationists have a different and more fundamental critique of criminal procedure. They believe that the real problem lies in its disputatious nature. They take a transformative approach, and hold that justice is to be assured

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26 It is arguable that, in practice, there can be a coercive element embedded in the restorative process, and hence that it can be indirectly punitive, especially as regards the recalcitrant offender. See below.

27 See Van Ness & Strong op cit 34-35 and Johnstone op cit 2.

28 Contemporary capitalist democracies have assigned due process an elevated status in their legal orders. Every decision of substance which has not been reached by a proper and fair procedure is likely to be impeachable. Before any other consideration, a decision stands or falls according to the propriety of the process by which it has been reached. Criminal procedure is, then, not merely a conduit to a substantive outcome. It is also a protective for the integrity of that outcome. The procedure is exalted as guarantor of the result. Due process is construed as the foil to substantive injustice. See McElrea (1999: 59).

not by re-organizing criminal procedure but by supplanting it with the restorative process.<sup>29</sup>

Due process seeks to regulate the conflict between the adversaries and to ensure that each enjoys, formally at least, an even chance of emerging victorious from the process. There is, of course, always only one real winner. And there has to be a loser. Restorative justice rejects the winner-loser dichotomy. It is concerned to produce multiple winners. It is not interested in losers. Its procedure is thus fundamentally collaborative in nature and method. The restorative process seeks to implicate all parties in fraternal relations, out of which is supposed to emerge the restorative sanction and, ultimately, the solution to the crisis of criminality.<sup>30</sup>

Advocates of restorative justice set much store by the restorative process. Indeed, they insist that restorative justice implies 'a distinctly restorative process'.<sup>31</sup> So crucial is the restorative process that it informs one of the best known definitions of restorative justice:

'Restorative justice is a process whereby parties with a stake in a specific crime resolve collectively how to deal with the aftermath of the offence and its implications for the future.'<sup>32</sup>

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29 See Zehr op cit 203, original emphasis: 'Not simply justice, but the *experience* of justice must occur.'

30 See Wright op cit 112.

31 Bazemore & Walgrave (1999: 51). See also Johnstone op cit 2.

32 Marshall op cit 28. Bazemore & Walgrave (ibid 48-49) say that 'this definition underscores the importance of a unique process that engages and involves stakeholders in an effort to deal with the problems crime causes'. Van Ness *et al* (op cit 5) describe it as a 'procedural definition'. Zehr, cited in McCold (2004: 161), gives a definition which also highlights process: 'Restorative justice is a process to involve, to the extent possible, those who have a stake in a specific offense and to collectively identify and address harms, needs, and obligations, in order to heal and put things as right as possible.'

This process-based notion of restorative justice is eloquently expressed by Bowen:

‘There is no predetermined outcome. It is through the *process* that transformation of the victim-offender relationship can occur ... The process allows the victim to view the offender as the person seated opposite now, rather than as the unknown person who previously offended. The offence takes on a more personal dimension for both parties. Fears are set aside.’<sup>33</sup>

For many restorationists, it would appear, the proof of the restorative justice pudding is in the process.

The restorative process is essentially the face-to-face collaboration of the restorative triad in a restorative conference to develop a restorative sanction.<sup>34</sup> Criminal procedure is transacted or, at least, intended to be transacted by lawyers in ritualized encounters in stylized courtrooms. Restorationists point out that both the offender and the victim are incidental to this process. They have (or are supposed to have) surrogates who engage each other on their behalf. But, say the restorationists, the procedure disempowers them. They are alienated from each other and from the very process upon which the future direction of their lives may depend.<sup>35</sup> Even if they wished to, they cannot collaborate. They would not be allowed to do so because the procedure itself requires that they relate to each other only, or primarily, as adversaries. The possibility of direct collaboration between the victim and the offender is excluded by the surrogacy inscribed in the procedure.<sup>36</sup>

33 Bowen op cit 19, original emphasis. See also Wright op cit 112, original emphasis: ‘The process itself should help promote understanding; the aim is to agree upon an outcome acceptable to both parties ... Attention would be given not only to the *outcome*, but also to evolving a *process* that respected the feelings and humanity of both the victim and the offender.’

34 See Bazemore & Walgrave op cit 50, Van Ness & Strong op cit 35, Van Ness *et al* op cit 5, Johnstone op cit 3, Zehr & Mika op cit 51, Bowen op cit 19, Zehr (1995: 203-204) and Pranis (2001: 288 & 290-291).

35 See Zehr *ibid* 203-204.

36 Settlement negotiations between the surrogates (for example, a plea bargain) cannot be equated with collaboration because they fall within the rules of the procedural contest.

Restorative justice eschews surrogacy in process. It is committed to *à deux* engagements between victim and offender under the auspices of the community. Needless to say, these may entail some form of antagonism.<sup>37</sup> But the rationale of the restorative process is to resolve such antagonism collaboratively. The idea is that the process should position the offender and victim into colluding to repair the damage caused by the crime. Hence their personal participation in the process, and their endeavours, with the assistance of community representatives, to construct a mutually acceptable restorative sanction.<sup>38</sup>

Whereas criminal justice understands process as a means to an end, restorative justice comprehends process as an end in itself. For the one, the process leads to justice. For the other, the justice is in the process. The restorative sanction is, in this sense, not the substantive outcome of a procedural exercise. Instead, it is the actualization of the process of doing justice. Restorative justice thus does not make a clear distinction between procedural and substantive levels of justice. There is only justice, undivided. If criminal justice has raised due process to eminence, restorative justice has invested the restorative process with near talismanic status.

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37 The antagonism may come from either the victim or offender. The victim's antagonism may derive from a desire for revenge against the offender, the offender's from a feeling of being humiliated by the process. See Acorn *op cit* 51-53 & 151-154.

38 The anti-statist impulses of restorative justice are perhaps most evident from its procedural focus upon the restorative triad. The state has no place here, as agent. Neither has the conventional lawyer. They may have an episodic contribution to make. But they and their predisposition to antagonism are not germane to the process. The state and its institutions are not welcome as components of the restorative project. The restorative process is to criminal procedure as the restorative sanction is to state punishment.

### 3.4 The Empowerment of the Victim

There is widespread agreement that restorative justice is in large measure about victim empowerment. It is generally acknowledged that 'a primary purpose' of the restorative conference is the 're-empowerment of the victim'.<sup>39</sup> Thus Zehr says:

'For victims, disempowerment is a core element of the violation. Empowerment is crucial to recovery and justice.'<sup>40</sup>

Braithwaite makes a similar argument:

'Disempowerment is part of the indignity of being a victim of crime ... It follows that it is important to restore any lost sense of empowerment as a result of crime.'<sup>41</sup>

Restorative justice is centrally concerned to undo the victim incapacitation inscribed in the criminal justice system and to rehabilitate the victim as a key factor in society's response to the criminal episode.<sup>42</sup>

Restorationists insist, correctly, that the criminal justice system victimizes the crime victim. In this regard they share the general aims of victimology to secure for the victim a better deal. However, when restorationists refer to victim empowerment, they encompass far more than conventional victimology does. For them victim empowerment is merely one of a range of intersecting goals focused

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39 Hayden & Henderson (1999: 80). See also Achilles & Zehr (2001: 90): '[V]ictims need to feel empowered. They need to recover the sense of autonomy and control that was taken away from them in the offense. Consequently, the justice process needs to be designed to re-empower victims.'

40 Zehr op cit 204.

41 Braithwaite op cit 56.

42 See Bowen op cit 22: 'The offending leaves the victim with a feeling of profound disrespect. So the victim needs in some way to recover from this and obtain the respect back again. They need to recover a sense of meaning.' See also Achilles (2004: 73), Batley (2005: 30), Zehr & Mika op cit 52 and Morris op cit 465.

upon reconstructing the criminal justice system *in toto*.<sup>43</sup> Their notion of the empowerment of the victim entails a radical corollary, namely, the disempowerment of the state. The restorationist aim is not to negotiate a secure place for the victim in the criminal justice system. The aim, instead, is to replace the criminal justice system with a restorative justice system which turns upon victim participation. In the restorative justice paradigm, then, it is not enough to make the extant criminal justice system victim-friendly. Victim empowerment means transforming the victim into an agent of the restorative process. The idea is to endow the victim with a 'party interest' in the offence and with 'standing' to participate in its resolution.<sup>44</sup>

As we have seen, it was the capitalist state which abandoned the victim and which renounced the concept of victimhood.<sup>45</sup> It is a first principle of restorative justice to rehabilitate the victim. Restorationists insist that the victim should have a premier role in the elaboration of the restorative sanction. Indeed, they understand that the success of the entire restorative justice project rests crucially upon the extent to which the victim is afforded the opportunity to become a genuine party to the process.<sup>46</sup> They also accept, however, that victim empowerment proper will have to occur despite the state. In other words, there is a relationship of inverse proportion between victim empowerment and the role of the state in the criminal justice system. Progress for the one entails regress for the other.

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43 Restorative justice implies that real victim empowerment is not possible within the confines of the criminal justice system. It is a system that is premised upon the marginalization of the victim. To the extent that it works, it does so because the victim has been marginalized. It therefore cannot be expected to tolerate proper victim empowerment.

44 Van Ness & Strong op cit 133-134. See also Acorn op cit 144: 'The victim is empowered by being restored to the status of active participant.'

45 See Chapter Two above.

46 See Achilles op cit 65: 'As I see it, the promise of restorative justice is the elevation of victims to the position of stakeholders in a justice process that starts immediately from the point of harm. They are no longer relegated to the sidelines, dependent on someone else to let them in.'

This is a crucial insight. It is an insight which founds the theorization of the criminal episode as a private conflict.<sup>47</sup> This privatized notion of crime may be understood as a victim empowerment strategy. Restorationists have identified the state as the source of the powerlessness of crime victims. They consider that re-humanizing the criminal justice system means privatizing our concept of crime. It is because the state has converted crime into a public matter that the private concerns of the victim have been severely neglected. Yet every victim of crime is aware of the fact that, when all is said and done, it is his person or property that has been violated, and that the meaning of such violation for him is never confronted and resolved by the criminal justice system.<sup>48</sup> Restorative justice seeks to acknowledge and accredit the real, individual victim of each crime, and to repair the damage which the crime has done to that particular person.<sup>49</sup> A public concept of crime, which casts the state as generic victim, is unable to accommodate such an agenda. Criminal justice needs a passive victim. Restorative justice demands an active one. Hence the campaign for a private concept of crime.

Restorationists see victimhood as a status which is acquired unwillingly, but which need not be calamitous. They consider that within the restorative context it can be transformed into a trigger for regeneration. Via the restorative conference, the victim is given the opportunity of analysing the meaning of his imposed status, and of transcending it, as one of the agents comprising the restorative triad. Victimhood under the criminal justice system is an alienated state. Restorative

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47 See Chapter Four below.

48 See Strang (2001: 71): 'For centuries victims had been the forgotten third parties in a justice system which conceives criminal behaviour as a matter between the offender and the state, with no formal role for the individuals who suffer the crime.'

49 See Consedine (1999: 81) who cites the following description of Marae justice in a television documentary: 'It is about recognising who got hurt – to hell with people saying society is the victim: it was me, not society, that got hurt.'



justice aims to overcome this alienation, by involving the victim in a process which is properly responsive to the condition of victimhood. In a word, restorative justice seeks to make a virtue of victimhood. The restorative project is to a large extent dedicated to the conquest of victimhood. It views the victim as a valuable resource who, if integrated into the justice system as an agent, can make a significant contribution to solving the crisis of criminality. Whereas criminal justice problematizes victimhood, restorative justice espouses it and allocates the crime victim a material role in the response to crime.

Of course, as noted earlier, the rise of the victim is proportional to the fall of the state. They are dialectical associates. Criminal justice sacrificed the victim to the domination of the state, to the extent that the state became the literal *alter ego* of the victim. Restorative justice posits a triumphant victim, who has been reinstated as agent in the criminal episode, at the expense of state sovereignty. The restorationist proposal to empower the crime victim must thus be understood in these terms of relational opposition. In the restorative paradigm, victim empowerment is more than just giving the crime victim a role in the criminal justice system. It is really about reconstructing that system in such a way that it cannot function without the co-operation of the crime victim.

### **3.5 The Reconstruction of the Offender**

Restorative justice is magnanimous. It is concerned not only to repair the damage which the offender has caused to the victim (and the community). It is concerned also with the welfare of the offender himself and to deliver him from the clutches of a criminal existence. It is, of course, arguable that criminal justice shares this aspiration to redeem the offender. State punishment may, in this regard, be viewed as attempt to discourage recidivism by convincing the offender that crime does not pay, and that it is more prudent to obey the law than to break

it. However, restorationists would distance themselves from such a programme. For them the offender is important, not as passive recipient of an imposed punishment, but as co-agent of the restorative process and co-author of the restorative sanction.<sup>50</sup>

It is a truism that criminal justice adheres to a negative construction of the offender. It is his imprudence which triggers the penal apparatus of the criminal justice system. The punishment itself always entails a negation of certain of the offender's rights.<sup>51</sup> Whatever benefits the offender may derive from his punishment are fortuitous by-products of an essentially negative mobilization of the coercive powers of the state. This negative conception extends to the offender being considered unencumbered in relation to his victim. The offender is encumbered by a duty to account to the state for his criminal deviation. However, he has no especial duty of care to his victim. The initiation of the criminal justice process severs his relationship with his victim. He has to answer for his crime, but not to his victim.

Restorative justice, by contrast, demands that the offender be accountable to his victim for the damage he has caused. It requires that the offender continue his relationship with his victim, at least until such time as the effects of his crime have been repaired. And whereas this relationship was initially an entirely negative one, restorative justice aspires to transform it into a positive experience, which can become the source of closure for the victim and of enlightenment for

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50 See Toews & Katounis (2004: 116) who urge that we recognize offenders as 'key stakeholders in the restorative process'. Restorationists consider that the criminal justice process reduces the offender to an object in that he is gridlocked into a process which dominates him. It is a process which has been constructed by his adversary, the state, and which has been imposed upon him. Criminal justice, then, is really about the state using its powers of coercion against a captive offender. The offender himself is in an important sense a 'victim' of the criminal justice system. Restorationists seek to end this 'victimization' of the offender by bestowing full agency upon him.

51 See Van Ness & Strong op cit and Zehr (2003: 69)

the offender. All of this is possible if the offender accepts responsibility for his offence, thereby inaugurating the restorative process. Offender accountability is an indispensable aspect of restorative justice. He needs to admit his culpability, and to commit to participation in the restorative process.<sup>52</sup> He has done the crime. Restorationists require him to play a key role in undoing it. Restorative justice wants to implicate the offender in the repair of the harm his crime has caused.

However, the object of drafting the offender into the restorative process is not reparative merely in respect of the harm suffered by the victim. Such *pro forma* restoration implies that the offender, once he has repaired the damage caused by one crime, theoretically would be free to commit any number of others. That is patently not what restoration is supposed to mean. It has to include offender restoration, in the sense that the offender comes to choose, via his participation in the restorative process, not to continue with further criminal activity.<sup>53</sup> Restorative justice understands that a crime is often an offender's mode of resistance against a sense of powerlessness derived from his conditions of existence. Thus Zehr notes:

'For many offenders, crime is a way of asserting power, of asserting self-identity, in a world which defines worth in terms of access to power. Crime, for many, is a way of saying "I am somebody".'<sup>54</sup>

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52 See Bowen op cit 19, Van Ness & Strong ibid 114 and Zehr (1995: 42-43 & 200-201).

53 See Bazemore & Dooley (2001: 103) who submit that 'support for offender redemption and reintegration remains a primary theme in most restorative justice writing'.

54 Zehr (2003: 70). See also Braithwaite op cit 57: 'The sense of insecurity and disempowerment of offenders is often an issue in their offending, and in discussion of what is to be done to prevent further offending.'

For restorative justice, then, the offender is in as much need of regeneration as his victim. 'Offenders too need healing.'<sup>55</sup> In this regard, offender restoration means empowering offenders to develop a new sense of self-worth.

Restorative justice purports to reconstruct the offender and the restorative process is the designated instrument of offender reconstruction. It is his collaboration, as agent, with the victim and the community in the elaboration and implementation of the restorative sanction which is supposed to be the saving of the offender. It is his participation in the restorative process that affords the offender an opportunity to reconstruct himself. By accounting for his conduct and by performing what has been settled upon to repair the damage he has caused, the offender simultaneously begins 're-storying' himself. That is, he begins to redefine his identity away from a despoiled persona towards an unsullied one.<sup>56</sup> Restorative justice thus proposes the 'death of the offender'. That is the ultimate aim of the restorative sanction, to 'punish' the offender with death. But it is a liberating and creative death, a 're-biographing' of the offender as one who is free of the criminal impulse and whose self-worth is derived from his cognizance of the value of his fellow human beings. In restorationist lore, the 're-storied' offender is the restored offender.

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55 Zehr (1995: 188). See Morris *op cit* 465: 'However, I also take restoring to mean redressing the harms caused both by and to the offender. This means that action needs to be taken to address both the factors underlying their offending in the first place and the consequences of that offending.' See also Van Ness *et al op cit* 6: 'Offenders, too, may need healing; they may need release from guilt or fear; they may need resolution of underlying conflicts or problems that led to the crime; and they may need an opportunity to make things right.'

56 See Braithwaite (2002: 157-158).

### 3.6 Community Participation

It is a restorationist absolute that the community feature as an integral part of the restorative process. While there may be some contention about the constitution of the restorative community,<sup>57</sup> there is unanimity that it is a 'stakeholder', along with the victim and the offender, in the restorative process. Indeed, many of its proponents are wont to equate restorative justice with community justice.<sup>58</sup> Although such an equation is not completely accurate, it does give a sense of the significance which restorationists attach to community participation in the restorative process. The community is the element which completes the restorative triad. It is thus also indispensable to the legitimacy of the restorative process. A restorative sanction which does not enjoy the imprimatur of the community is, in principle, doomed to failure. The restorationist project stands or falls according to its readiness to embrace community participation as a compositional requisite.

It would appear that community participation has two intersecting goals. Firstly, the community operates 'as a resource for the resolution of disputes and victim/offender reintegration'.<sup>59</sup> Its participation injects a social dimension into the restorative process and makes the restorative sanction a social construct.<sup>60</sup>

57 For discussions of the meaning of the term 'community' see Van Ness & Strong op cit 32-33, McCold op cit 155-157 and McCold & Wachtel (2003: 294-296). These discussions are concerned with specifying the ambit of the 'community' and do not go to the role of the 'community' as 'stakeholder' in the restorative process. Their details therefore need not detain us here.

58 See Zehr & Mika op cit 80 and Crawford & Clear (2001: 127).

59 Crawford & Clear *ibid* 132.

60 Restorative justice rejects the atomistic theory of personhood which founds the epistemology of criminal justice. Instead it proposes a social ontology of the person. It posits a personhood which is socially constructed, in relations of conflict and co-operation with other persons. It comprehends offender and victim as members of a determinate social unit, each encumbered with the responsibilities accessory to such membership. The status of offender or victim is not merely legal; it is also derived from the social. A person is a victim or offender not only in law but also in community. Criminality and victimhood are thus not individualist attributes. They encompass the community directly. The community is thus as much a protagonist in the criminal episode as are the offender and the victim.

This means that the nexus between the victim and offender is extended beyond the criminal episode into the community. They relate to each other not as individual but as social beings. The community becomes the custodian of the restorative sanction, and constitutes the milieu for its implementation. It becomes the locus of the healing of the victim and offender, which is achieved by their reintegration into the community.<sup>61</sup> This aspect of community participation in restorative justice is essentially about the community providing resources of renascence to both victim and offender.

Secondly, community participation in the restorative process is intended to be a mechanism of community restoration. Restorative justice postulates that crime rends community.<sup>62</sup> Crime is a social problem which endangers the welfare of the community and threatens its cohesion. The community is, in this regard, the generic victim of all crimes.<sup>63</sup> Every crime unsettles community balance and is therefore a community issue. Every crime victimizes the community. The state invented itself as generic crime victim. Yet, very little crime specifically threatens the integrity of the state. By contrast, every crime is a real threat to the equilibrium of the victimized community. Hence the restorationist insistence upon community restoration.<sup>64</sup> Zehr's comment is representative:

‘The community also needs healing. Crime undermines a community's sense of wholeness, and that injury needs to be redressed.’<sup>65</sup>

Restorative justice is thus as much about healing the community as it is about healing victim and offender. Indeed, the success of victim and offender reintegration into the community is directly related to the restoration of the community.

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61 See Marshall op cit 34-35, Van Ness & Strong op cit 161-162, Zehr & Mika op cit 52 and McCold op cit 168.

62 See Van Ness & Strong ibid 32, McCold & Wachtel op cit 297 and Bowen op cit 20.

63 See Crawford (2002: 118).

64 See Braithwaite op cit 58, McCold op cit 157, Zehr & Mika op cit 53 and Van Ness *et al* op cit 6.

65 Zehr (1995: 188).

For the restorationists, then, community participation is a *sine qua non* of the success of any restorative project. The resurgence of the victim and the redemption of the offender occur in the bosom of the community. There is a genetic connection between the victim and offender, on the one hand, and the community, on the other. All three have been sullied by the crime. All three have to be restored. According to the restorationists, community participation is the key to restoring the triad. It is community involvement that gives the victim and offender a real chance of reaching the rapprochement needed to develop and implement the restorative sanction. It is community oversight that ensures that the injury to the victim is repaired and that the offender accounts for his crime. The reintegration of victim and offender is based upon the deployment of the analeptic resources of the community. And it is only the community which, by its participation in the restorative justice process, can ensure that its own integrity is constantly re-inured against the mischiefs of crime. In this regard, the notion that restorative justice is community justice is not too far off the mark.

### **3.7 Critique of the Claims of Restorative Justice**

The five elements explicated above collectively comprise the constitutional tenets of restorative justice. Restorationists invariably rely upon most or all of them in their endeavours to propagate and popularize their project. These are the elements which provide the source material for the paradigm shift which restorationists urge. They are the claims of restorative justice. The remainder of this chapter offers a Marxist treatment of these claims. It seeks to develop a materialist assessment of the tenets of restorative justice and to uncover their class content.

The critique proceeds on a level which might be classified as internal. That is, it is in the nature of a 'micro-critique', concerned to evaluate the compositional specificities of restorative justice against the yardstick of Marxist class analysis.<sup>66</sup> We shall begin at the end, with the last tenet of restorative justice discussed above, namely, that of community participation. This choice is motivated by the fact that community participation is derived from the concept of 'community', which item is, from the Marxist perspective, easily the most problematic one in the conceptual canon of restorative justice.<sup>67</sup> A critical analysis of community participation will provide insights which have direct relevance for the analysis of the other four elements of restorative justice.

### 3.7.1 Of Community, Affectivity and Functionalism

Despite the imprecision which characterizes the restorationist position, there are two aspects of community which bulk large. Firstly, the statutes of restorative justice contain a presumption of affective community, that is, a community constituted around a shared complex of social and cultural values. 'Affective community is the reciprocal consciousness of a shared culture.'<sup>68</sup> Whether the restorative community is conceived as a geographic community or as a

66 Internal critique may be contrasted to external or 'macro-critique' which is concerned to evaluate the relation of restorative justice to capitalism. The argument of the external critique is simply that comprehensive restorative justice is incompatible with capitalism. It ultimately entails the destruction of the capitalist state and is therefore unachievable within the confines of the capitalist system. Internal critique must presume the opposite, namely, that comprehensive restorative justice is indeed practicable under capitalism. Internal critique is not possible without an acceptance of the hypothetical validity of the restorative justice project. See Delgado (2000: 758 & 763).

67 The problematic nature of the concept of 'community' is widely recognized within restorationist ranks. See, for example, McCold op cit 155: 'One of the greatest challenges facing restorative justice, as it aspires to maturity, is to define the role of "community" in theory and practice.' See also Pavlich (2004: 171), McCold & Wachtel (2003: 294), Schiff (2003: 329) and Walgrave (2003: 68). There seems to be two major variants of 'community', namely, the community-as-place and the community-as-network. The former is delineated geographically or spatially (the local community), the latter emotionally (the community of care).

68 Wolff (1968: 187).



community of care, there is substantial accord that either variant ought to be affective. It should be integrated in terms of a common morality and culture. In practice, this would mean that the restorative community is united in its rejection of crime and in its commitment to restorative justice as the solution to the crisis of criminality. Community participation in this context is a structured process, from the application of affective solidarity to the inauguration of the restorative process, through the development of the restorative sanction to the facilitation and monitoring of its implementation.

Secondly, restorative justice comprehends affective community from a functionalist perspective. Functionalism is a sociological approach which is concerned to engage the function of social activity. According to Giddens:

‘To study the function of a social practice or institution is to analyse the contribution which that practice or institution makes to the continuation of society as a whole.’<sup>69</sup>

Robertson takes the point further:

‘Functionalist theory implies that society tends to be an organized, stable, well-integrated system, in which most members agree on basic values. Under normal conditions all the elements in the social system ... tend to “fit together”, with each element making a contribution to overall societal stability.’<sup>70</sup>

Functionalist thought, then, is interested in understanding how social practices and institutions operate to ensure the smooth functioning of society. Its watchword is social equilibrium. And any activity which disrupts social

69 Giddens (1993: 711). See also Haralambos & Holborn (1991: 8), Swingewood (1975: 188-191) and Lawson & Garrod (1996: 105).

70 Robertson (1977: 17).

equilibrium is considered dysfunctional.<sup>71</sup>

Restorative justice brings a functionalist reading to affective community. Criminal conduct is comprehended as an attack upon the peaceful functioning of the community. It disturbs the composure of the community and threatens its unity. Peace and equilibrium are recovered by way of community participation in the restorative process. For restorative justice, then, social equilibrium and the affectivity upon which it is founded are the norm. Crime is a symptom of a social pathology which violates the norm and creates disequilibrium. The function of the restorative process is to neutralize the effects of crime and return the community to its normal state of harmony. According to the restorationists, community solidarity is best reclaimed by involving the disrupted community directly in the restorative endeavour. Community participation in the process of its own recovery is, in this connection, deemed to be both necessary and desirable.

From a Marxist perspective, the first and obvious question about any community is its class character. Class is the elemental unit of social organization in the capitalist system. Indeed, all historical societies have been class societies. Hence class enjoys the status of a fundamental analytical concept in the theory of historical materialism. Marxism teaches that we exist first and foremost as members of a determinate social class, and that our entire existence is marked by the reverberations of the class struggle which is the hallmark of human civilization.<sup>72</sup>

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71 See Robertson *ibid* 17-18: 'In the functionalist view, a society has an underlying tendency to be in equilibrium, or balance ... Because their main emphasis is on social order and stability, functionalists risk the temptation of dismissing disruptive changes as dysfunctional, even if those changes are necessary, inevitable, and beneficial in the long run.' See also Swingewood *op cit* 188: 'Explicit in these formulations is a model of society as a functional unity, its constituent parts meshing together with a degree of harmony and consistency to prevent serious conflict from developing; and that such conflict must be seen as dysfunctional to the maintenance of the whole.'

72 See Chapter Two above.

Restorative justice betrays a consistent ignorance of or disregard for the importance of social class and its impact on most aspects of human existence, including crime and its punishment.<sup>73</sup> It postulates a community free of structural class conflict. If restorative justice accords any analytical credence to a determinate social combination, it is to the affective community. For restorationists, it is a theoretical imperative that all of us belong to a community with which we identify naturally and to which we feel an elemental allegiance. However, their notion of an affective community is based upon the incorrect supposition that crime and class are discrete phenomena, without any moments of intersection. Hence the tendency amongst the proponents of restorative justice to treat our class affiliations as theoretically insignificant.

In the restorative credo, community consciousness is prior to class consciousness, and community cohesion takes precedence over class struggle. Certainly, virtually all communities, whether spatially or emotionally constituted, are affective in their rejection of crime. All of us, except perhaps criminals themselves, share an abhorrence for crime. In this regard we are united across class borders. Rival classes coalesce in their response to crime.<sup>74</sup> Our common humanity asserts itself in the face of the crisis of criminality. That is as it should be. However, restorationists fail to comprehend that our common humanity is permanently fractured by the facticity of class and the inevitability of class

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73 This tendency of restorative justice has elicited the following rebuke from Takagi & Shank (op cit 158) in respect of Braithwaite's concept of re-integrative shaming: 'Braithwaite does not discuss the issue of power, who holds it, how it is exercised, or how it is channeled into certain dominant structures, especially in class/race/gender relations of domination and subordination. Society is viewed in terms of "individuals", rather than as social formations, social forces, and social structures. As such, the shaming/integration theory is ahistorical and fails to capture the deterioration of the condition of the working class, and their progressive marginalization in production, consumption, and community life.' See also Cunneen 2003: 192: 'There are often assumptions made that all individuals will experience the restorative justice process in a certain way irrespective of their gender, class, "race", ethnicity or age.'

74 See Ignatieff (1985: 90).

conflict. They assume 'a classless society at the local level'.<sup>75</sup> They forget that in our capitalist world, every affective community is always also a community of class, and the temper of its affectivity derives from its class character.<sup>76</sup>

### 3.7.2 Communities of Class

In relation to the restorative justice project, the community of class may be composed of either a single class or two classes. Its class composition is derived from the class positions occupied by the two primary 'stakeholders' in the restorative process, the victim and the offender. The class-singular or homogeneous restorative community is constituted when both offender and victim belong to the same social class. They are class equals. Of course, crime jumps class barriers easily. If this happens, the offender and victim are members of different social classes, and hence have different 'natural' community affiliations.<sup>77</sup> In the class-dyadic or bifurcated restorative community, the offender will typically be proletarian or lumpenproletarian, and the victim either bourgeois or petite bourgeois.<sup>78</sup>

A community which consists of a single class is an affective community, in the sense that its members will, as a rule, all share the same class psychology and values. The class-singular community is in this regard a 'natural' community,

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75 Repo (1977a: 48).

76 The following comment by Repo (1977b: 67) on class denialism is instructive here: 'Since the concept of class has been derived from reality, as an attempt to explain history and the present capitalist order, and since the concept is firmly based on economic and social realities – the ownership of the means of production combined with the power and privileges in one's social position – the denial of social classes constitutes a denial of objective reality.'

77 Different classes generally occupy different living spaces and have different class psychologies. In the class-singular restorative community, therefore, the community attachments of the victim and offender will likely coincide both spatially and emotionally, while in the class-dyadic restorative community, these attachments will likely differ on both counts.

78 See Acorn (op cit 145) who posits that 'the perpetrators of crime are likely to occupy a lower socio-economic strata (*sic*) than their victims'. See also Ignatieff op cit 96.

bound together by common material interests and a unified worldview. The participation of such a community in the restorative process ought to be both uncontroversial and unremarkable. Whatever questions, tensions or difficulties arise ought to relate to technical or implementation matters only. They should not go to the legitimacy of the restorative process or the integrity of the restorative project. However, as we shall see, it all depends upon which class comprises the community in question.

If the restorative community is class-dyadic, the question of its participation in the restorative process is immediately problematized. The constitution of the restorative community then becomes a vital issue. For when crime crosses class boundaries, community homogeneity is no longer either given or guaranteed. Indeed, it is non-existent, and restorationists are saddled with the thorny problem of having to construct community solidarity in the face of class antagonisms rooted deep in the structure of the mode of production.

In the class-singular community the net effect of a successful restorative conference is always to reinforce the material culture of the constituent class. If the community is bourgeois its bourgeois sensibilities prevail, if petite bourgeois its petite-bourgeois insecurities are assuaged, and if proletarian its proletarian deprivations are confirmed. Community participation in this context is ultimately about convincing the offender to accept and abide by the mores of his class. For the bourgeois and petite bourgeois offender this is unproblematic. His crime is simply an index that he has taken the edacity and cupidity of his class to its logical conclusion. Restorative justice requires him to keep a reign upon the rapacity of his class impulses, and to respect the agreed legal boundaries of his class privileges. Here community participation amounts to his being admonished by his class companions not to disrupt the social compact with internecine conflict. It is

also his route to reintegration into the ranks of his class companions. For his victim, community participation is the avenue back to the personal comfort which comes with class peace.<sup>79</sup>

If the single-class community is proletarian and/or lumpenproletarian, the restorative justice project takes on an altogether different complexion. The whole of such a community is structurally the victim of exploitation by the bourgeoisie. It is a site of the agglomeration of labour-power as value-producing commodity and, hence, of surplus-value extraction. Its offenders are the anti-social and alienated products of capitalist exploitation and its repressive accoutrements. Its victims are the weak ones, defeated and disarmed by the brutalities of unrelenting poverty and hopelessness. Criminals and casualties are together trapped in a barbaric existence, imposed by the reproductive imperatives of the capitalist mode of production.

In this milieu the community's participation in the restorative process is potentially injurious to its interests as a class. For restorative justice, in the final analysis, requires the community to condone the structure of capitalist exploitation and oppression. The proletarian community is expected to make peace with its conditions of life. In other words, restorative justice implicates the proletarian community in its own disadvantage.

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79 Levrant *et al* (op cit: 16) note that, in comparison to poor communities, 'it is likely that affluent communities will have the resources to develop programs that are more integrative because they offer a greater number of quality services to offenders'. Of course, the same quality of services would be available to those of their victims who may require 'healing' before they are able to resume the 'normal' privileges of their bourgeois or petite bourgeois existences.

### 3.7.3 Functionalism and Class Conflict

As intimated earlier, restorative justice is informed by the precepts of normative functionalism. It therefore comprehends social conflict in pathological terms, that is, it 'treats conflict as aberrational, and the absence of it as the desired state'.<sup>80</sup> This, of course, presupposes that extant social arrangements are at least defensible, probably legitimate. Certainly, it does not countenance the possibility that conflict is endemic in our society.<sup>81</sup> And it does not consider that the solution to the crisis of criminality may lie, not in the restoration of harmony to social relations, but in the dismantling of those relations. Restorationists are perforce functionalists. They seek to remove the alleged dysfunction which crime imports into community life. They are, in this connection, defenders of the structure of community relations. These have to be restored to their pre-crime vivacity. The crime has breached the affective concord. The repose of the community has to be reconstituted via the restorative process.

Marxism repudiates the restorationist ambition to return the community to the state of functioning harmony which it supposedly enjoyed prior to the criminal episode. That ambition perceives as normal and final the class composition of the affective community and, hence, accepts as natural the social and economic inequalities which percolate throughout its various levels. Marxism considers that both class and its attendant inequality are neither natural nor necessary. They are the products of a matrix of historically specific material conditions. These conditions are structured by conflict. Crime is one expression of this conflict. It is neither an aberration nor a pathology. It is a dramatic, often violent, outburst of the discord which lies at the heart of every class society. Delgado declares:

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80 Delgado op cit 770. See also Crawford & Clear op cit 133.

81 See Delgado (ibid) who argues that 'in a society like ours, tensions among groups may be normal, and not a sign of social pathology'. See also Abel (1981: 248-249) who accuses legal informalism (of which restorative justice is a variant) of identifying 'conflict exclusively with threats to stability, obscuring the fact that many people experience the status quo as oppressive and see themselves as the victims of constant conflict.'

‘Surely, in such a society, one would expect the have-nots to attempt to change their social position (by legal or illegal means), and the haves to resist these attempts. Conflict is a logical and expected result.’<sup>82</sup>

For every capitalist social formation, disequilibrium is an existential exigency. Class struggle is inscribed in the social relations of production.

### 3.7.4 The Class-Singular Community

Let us examine the functionalist aspirations of restorative justice for the single-class community. It may be conceded, of course, that such a community is not plagued by class struggles, other than perhaps in the form of non-fundamental class fractional disputes. The single-class community would thus be united in terms of its own real class interests. It is conceivable that in such communities crime does sunder the collective equilibrium to which restorationists refer. Here it is indeed possible that community participation in the restorative process may lead to the recovery of social harmony. Again, however, it all depends on the class comprising the community.

A bourgeois or petite bourgeois community typically possesses a high level of collective class consciousness and displays abundant class solidarity.<sup>83</sup> Its members are generally acutely aware of their class privileges and are amenable to co-operation with their fellows to secure their positions and property. Social relations in such a community are usually cordial. It is an affective community. The trouble is that its cohesion is structured by its class composition. The collective morality which such a community espouses is necessarily derived from its relation of contradiction to its class enemies. In other words, its affectivity is class bound and constituted in class conflict. Restorative justice does not attribute

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82 Delgado *ibid* 770-771.

83 See Repo (1977a: 51-52) and Abel *op cit* 250.



any analytical significance to the class basis of community equilibrium. It is concerned only to ensure that such equilibrium is restored after the criminal episode. It has no critical interest in the nature of that equilibrium. The inescapable conclusion is that, in relation to this community, the restorative justice project is dedicated objectively to the reproduction of the culture, entitlements, and prerogatives of its constituent class.

The notion of equilibrium is not pertinent to a proletarian community, despite the fact that, like its bourgeois and petite bourgeois counterparts, it is class-singular. Such a community is permanently wracked by the effects of exploitation and oppression. It is structurally dysfunctional. For it, discord is an existential condition.<sup>84</sup> Whatever affectivity it may possess for participation in the restorative process is entirely tenuous. The proletarian community is both home to the bulk of the criminal population and itself the victim of incessant criminality. Restorative justice requires such a community to believe that the crime has disturbed its natural balance. And it asks this community to accept that the restorative process will repair the damage caused by the crime. Community consensus will be restored.<sup>85</sup>

There is a fundamental *non sequitur* here, namely, restoration of that which cannot be restored, the non-existent. It is logically impossible to return the community to a state of equilibrium if it was not in such a state before the

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84 Proletarian disorganization is the price of bourgeois and petite bourgeois sodality. That is the dialectic of the struggle in which these classes are locked.

85 Takagi & Shank (op cit 161) are sceptical about restorationist promises to proletarian and lumpenproletarian communities: 'Yet, what does "community" mean in a place like West Oakland, which is populated with Ellisonian invisibles? When over half of those housed in homeless shelters are African American women and children, and others not in shelters are waiting in food kitchen lines? What does community mean for those begging in front of restaurants and grocery stores, for the people searching in garbage cans, and for those working day and night filling shopping carts with recyclables? When night falls, we see the homeless sleeping in the recesses of doorways of buildings. All of this is invisible, in the sense that we choose not to acknowledge their existence and thereby their humanity.'

commission of the crime. The rejoinder might be that the restorative justice project aims, if not to restore, then to create proletarian community harmony. That, however, is another matter altogether, which will be canvassed elsewhere in this chapter. Suffice it to say, at this point, that to restore a working-class community to its pre-crime situation is to affirm the conditions of its exploitation.<sup>86</sup>

The working class is expected not only to police itself but also to contribute to the maintenance of the class rule of the bourgeoisie. That is the real import of proletarian community participation in the restorative process. Both the criminal and the rest of his class are implicated in the legitimation of the capitalist system and hence in the defence of the material conditions on which is based the dominance of its class enemy. The point is that for the proletarian community, restorative justice is likely to make a bigger contribution to securing proletarian consent to the rule of the bourgeoisie than to solving the crisis of criminality.<sup>87</sup> Restorative justice cannot restore equilibrium to such a community, but it can encourage it to acquiesce in the profound disequilibrium of the capital-labour relation which structures its existence.

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86 See Delgado op cit 763-764: 'One difficulty with restorative justice inheres in the concept itself. Restorative justice, like tort law, attempts to restore the parties to the status quo ante – the position they would have been in had the crime not occurred – through restitution and payment. But if that status quo is marked by radical inequality and abysmal living conditions for the offender, returning the parties to their original position will do little to spark social change.' See also Findlay (2000: 407).

87 Abel (op cit 250 & 262) distinguishes between conservative and liberating conflict. The former 'preserves the structures of domination that characterize capitalist society', the latter 'challenges those structures of domination'. He argues that legal informalism (which would include restorative justice) tends to render criminal conflict conservative, thereby contributing to the reproduction of the capitalist mode of production.

### 3.7.5 The Class-Dyadic Community

Much the same can be said of the class-dyadic community of restorative justice, where the offender and victim are members of rival classes. Typically this community would be constituted from the proletariat, as class home of the offender, and the bourgeoisie or petite bourgeoisie, as class home of the victim. Here, again, it is not possible for the restorative process to re-establish the social equilibrium which the crime has supposedly shattered. It is not possible because such equilibrium did not exist prior to the commission of the crime. The membership of the restorative community divaricates by social class. Objectively the two components are class enemies. It may be accepted that they do constitute an affective community for the purposes of the restorative process. This community may thus well be integrated in its response to the crime. But it is simultaneously rent by inescapable and objective contradictions.<sup>88</sup> The truth is that the two-class community cannot be a community of harmony. It is, literally, a collectivity of enemies. Restoration here means restoring the domination of the one part and the subjugation of the other.<sup>89</sup>

Affectivity in respect of the crime is achieved at the expense of the class interests of the proletarian component of the dyadic community. The restorative process reconstitutes the stability of the bourgeois or petite bourgeois component, but simultaneously reinforces the precariousness which pervades the existence of

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88 See Repo (op cit 50) who reminds us that: 'A stroke of a pen or a game of semantics, however, will not abolish the existing social reality: we live in a class society with major class contradictions everywhere. The class differentials and conflicts can be ignored; but they will not vanish.'

89 The following statement by Repo (ibid 54) about 'community control' should stand as a warning about the potential class biases of restorative justice: 'In the particular confrontation of classes that takes place in the neighbourhood organizations, the working class has been and continues to be systematically defeated.' See also Levrant *et al* op cit 16: 'Despite their progressive underpinnings, restorative justice programs may have unintended class and racial biases that work to the disadvantage of poor and minority offenders.'

the proletarian component. The working-class element of the restorative community experiences the brutishness of crime at first hand on a day-to-day basis. Its participation in the restorative process indicates a willingness to contribute to repairing the harm caused by one of its number. The trouble is that such participation contributes nothing whatsoever to bringing stability to its world. Instead, this process usually leads it to submit to the worldview of its class enemy in the restorative community.

In other words, the restorative process becomes a process of class domination. The preparedness of the proletarian component of the restorative community to participate in a confederated class response to crime redounds usually to the benefit of its class opposite. Bourgeois unity and composure are restored, but so are proletarian destitution and desperation. The equilibrium which restorative justice brings to the two-class community is the equilibrium which comes with the dominance of bourgeois ideology. For the working class, participation in the restorative community means the return of a stable milieu for its exploitation and oppression.

A major the purpose of community participation in the restorative process is to repair the perceived dysfunctions in community relations caused by the criminal episode. This purpose is, however, profoundly reactionary in that it constitutes an apologia for the social relations of production of the capitalist mode of production.<sup>90</sup> Whether the restorative community consists of one or two classes, the outcome of the restorative process is commonly the same: peace is restored temporarily to the capital-labour relation, and routinely at the expense of

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90 See Delgado op cit 771: 'Insofar as restorative justice aims at smoothing over the rough edges of social competition and adjusting subaltern people to their roles, it is profoundly conservative. While restoration and healing are emotionally powerful objectives, it is hard to deny that they can have a repressive dimension as well.'

the working class. Despite the best intentions of the restorationists, the capitalist context transforms the restorative process into a process for affirming the unfreedom of the proletariat. Whatever social equilibrium is restored is structured, for the most part, by the class interests of the bourgeoisie. And whatever justice is achieved is, at bottom, class justice. In Abel's terms, community participation in the restorative project renders the criminal conflict between victim and offender conservative, thereby helping to maintain and reproduce the hegemonic configuration of capitalism.<sup>91</sup>

Much of what has been argued in the foregoing critique of community participation applies, *mutatis mutandis*, to the remaining elements of restorative justice. The operation of each one is structured by the same class conflicts and considerations as were identified in respect of community participation. The restorative sanction, the restorative process, the empowerment of the victim and the reconstruction of the offender are all subject, to a greater or lesser extent, to the exigencies of capitalism as a mode of production. The critical discussion of these elements need not therefore re-examine issues canvassed earlier.

### 3.7.6 Class and the Restorative Sanction

The restorative sanction is the measure of restorative justice. It is meant to be the expression of the resolution of the conflict triggered by the criminal event. It is supposed to be the mechanism to restore community equilibrium, heal the victim and encourage the transformation of the offender. It is the materialization of the non-punitive response to crime which restorative justice propounds. It is the key to the attainment of justice for all 'stakeholders' in the restorative process.

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91 See Abel op cit 250. See also Crawford & Clear op cit 139: 'Making amends and restoring troubled relations in an unequal society may mean restoring unequal relations and, hence, reaffirming inequality. Moreover, restoring the preexisting equilibrium may mean reinstating and reaffirming relations of dominance.'

It was contended earlier that the restorative process restores community equilibrium only in the sense that a truce is reached between class enemies, if the restorative community is composed of two classes, or in the sense that the material conditions of the existence of the class are affirmed, if the restorative community consists of one class. The restorative sanction is the formal outcome of this process, and conceals a commitment to the defence of the social relations of production of capitalism behind a concern for social peace and community harmony. The restorative sanction is, in this regard, a manifestation of class accommodation and a resource of class domination. It is constructed upon the basis of our common human aversion to crime, while reinforcing a vision of humanness that is uncommonly sectional. It is a mechanism which, in the final analysis, restores community equilibrium by confirming the structural inequity of the capital-labour relation.

The restorative sanction is the privatized resolution of the conflict generated by the criminal episode. In the context of capitalism, privatization of the criminal episode entails its commodification. By extension, such privatization also commodifies the restorative sanction. It becomes an object of negotiation and exchange between the 'stakeholders'. A market in justice is created, which, like all commodity markets, is governed by the principle of equivalence.<sup>92</sup> Victim and offender, as primary 'stakeholders', come together as equals in this market to negotiate the resolution of 'their' dispute. The restorative sanction is the contract upon which they have settled as the consensual outcome of their deliberations.<sup>93</sup> There is no imprint of a coercive authority in the restorative sanction. It is the bargain struck by equals.

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92 See Chapter Five below.

93 See Weitekamp (1999: 97).

However, formal equality can conceal substantive inequality. Contracts are regularly concluded in which the parties are unequal, sometimes starkly so.<sup>94</sup> The restorative sanction may, similarly, be structured by inequality. Its terms depend, ultimately, upon the power - the class power - of the primary 'stakeholders' and their respective communities. The class power wielded by the parties to the restorative process is reflected, ultimately, in the restorative sanction. It is, in the result, entirely possible that the terms of a restorative sanction may allow the rich offender to 'restore' community equilibrium with a generous offer of compensation to the victim, and even to the community itself.<sup>95</sup> It is also possible that a poor offender may have to accept a sanction that is incommensurate with his offence or that he does not have the means to satisfy.<sup>96</sup> The point is that restorative justice does not comprehend the impact which the class position and power of the parties may have upon the restorative sanction.

Certainly, then, in a two-class restorative community, the restorative sanction can easily become enmeshed in the machinery of unequal class power.<sup>97</sup> If the restorative community is class-singular, the restorative sanction, logically, cannot express a power differential between the primary 'stakeholders' based on class. However, this does not mean that the sanction is necessarily free of the impress of class power. Here the interests of the bourgeoisie constitute the

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94 The form contract, so ubiquitous in the capitalist world, is a typical example. The individual buyer generally has no say in the determination of the terms of the contract. They are decided by the seller and offered to the buyer on a take-it-or-leave-it basis. Bargaining is rarely an option.

95 See Levrant *et al* op cit 16.

96 See Delgado op cit 759.

97 The following comment by Abel (op cit 257) is instructive here: 'Informal processes commonly characterize their outcomes as compromise solutions in which nobody wins or loses. But compromise produces unbiased results only when opponents are equal; compromise between unequals inevitably reproduces inequality.' The fact that the restorative 'stakeholders' are not formally opponents does not diminish the pertinence of the comment to the restorative sanction.

decisive class context of the restorative sanction. The bourgeois ideological project centres upon the generalization of its sectional interests to society as a whole. It is a project which pathologizes all social conflict, both inter-class and intra-class. Crime in the class-singular community is a form of intra-class conflict which subverts social stability and thereby confounds the bourgeois hegemonic programme. In this context, the restorative sanction amounts to a device of equilibration. By comprehending the crime as an index of social pathology in an otherwise legitimate social organization, the restorative sanction becomes one more resource in the bourgeois ideological storehouse. Objectively, it reconciles the 'stakeholders' to the social mores of the bourgeoisie as ruling class, and hence to its ideological project to secure the reproduction of the social relations of production of capitalism.

All in all, then, the restorative sanction cannot circumvent the relations of class which form the backdrop to the restorative process in capitalist society. Nor can it evade the inequalities of class power which the 'stakeholders' may import directly into the restorative process. Class will find its way into the structure of the restorative sanction. Its declared purpose may be to resolve the criminal dispute according to the wishes of the 'stakeholders' and with due regard for the dignity of all concerned. However, its undeclared purpose is always to restore to full functioning the capital-labour relation which the crime has disrupted. In this sense, there is always a justification for the extant social relations of production immanent in the restorative sanction.

### **3.7.7 Class and the Restorative Process**

The restorative process is the road to the restorative sanction. As noted earlier, it is designed to involve the parties - victim, offender and community - in a collaborative effort to deal with the effects of the criminal episode. Fraternity is



the watchword of restorative procedure. The 'stakeholders' participate in order to find a solution - the restorative sanction - which is acceptable to all. This requires co-operation, not competition. Hence the procedural sodality of restorative justice. It is a sodality which is theorized as the negation of the antagonism which founds conventional criminal procedure. The irony is that the antagonism which the restorative process seeks to avoid can be more real than the collaboration which it seeks to promote.

The oppositional structure of conventional criminal procedure has this virtue, at least: it accepts that conflict is at the heart of all law and every legal system. Restorative justice, as we have seen, has a functionalist conception of social and legal relations. Hence, although it understands the criminal episode in conflict terms, it is a conflict which is supposedly abnormal and which needs to be resolved by the parties *inter se*. In other words, restorative justice construes crime primarily as individual eccentricity. Whatever linkages between crime and structural social conflict, and hence between crime and class, it may comprehend are located on the periphery of its compass. The restorative process reproduces this mostly congenial view of social relations. It is not merely due process rendered non-adversarial. It is restorative justice in practice. It is in the process that the parties find the justice.

However, virtually everything that has been said above about the class nature of the restorative sanction is applicable to the restorative process. The class relations which structure the restorative sanction are discernible already in its immediate precursor, the restorative process. The 'stakeholders' bring to the restorative process all the psychological, cultural and moral suppositions of their class. If the two primary 'stakeholders' are class enemies, it is rank idealism to suppose that they can really collaborate in the way that the restorationists propose.

From the Marxist perspective, it is axiomatic that any process can achieve only that which is permissible within the ambit of the material context of its operation. No process can ever overcome this context. The restorative process cannot make comrades out of class enemies. It cannot surmount objective class contradictions by negotiation. These infiltrate the restorative process in the same way as they permeate the restorative sanction.

Restorationists value the restorative process itself as the nub of the pursuit of true 'justice for all'. However, class differences between the parties to the process can easily jeopardize the justice of the process. There is always the possibility that the stronger party, that is, the party who belongs to the dominant class, will be able to turn the process to advantage.<sup>98</sup> Class is the most significant objective fact of our social existence. Class conflict is inescapable. No amount of goodwill and commitment from either the offender or victim can prevent class interests from asserting themselves and skewing the process. Again, no reliance can be placed upon community participation to overcome these class dichotomies because the community itself is divided by class and mirrors the class antagonism between victim and offender. Community participation is no bar to class justice.

The restorative process will likely be properly collusive if offender and victim are members of the same class. Here there are no fundamental

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98 See Levrant *et al* op cit 16: '[W]ithin the restorative justice process, might affluent offenders be treated more favourably? In victim-offender mediation conferences, for example, it is possible that offenders who are more educated, better dressed, and more skilled verbally will negotiate more favourable sanctions. It is instructive that mediators in VOM programs tend to be White, male, and better educated – traits that may converge with those of more affluent offenders.' See also Delgado op cit 769: 'VOM sets up a relatively coercive encounter in many cases between an inarticulate, uneducated, socially alienated youth with few social skills and a hurt, vengeful victim. This encounter is mediated by a middle-class, moralistic mediator who shares little background or sympathy with the offender, but has everything in common with the victim. To label this encounter a negotiation seems a misnomer, for it is replete with overt social coercion.'

contradictions within the process as such. If the protagonists are bourgeois or petite bourgeois, there is every possibility that the restorative process may well mean 'justice for all'. However, for the dominated classes, such procedural collusion reinforces the structure of their domination. Working-class offenders and victims may reach a genuine restorative sanction via genuine commitment to the restorative process. In other words, the process may actually lead to a mending of the harm caused by the offence and restoration of a community equilibrium of sorts. But it must be remembered always that the community restored is a community of privation and indigence, and which provides fertile breeding ground for legions of offenders, and victims. For the proletariat, the restorative process is one more way of making it complicit in its own exploitation.

The relationship between the offender and the restorative process is important and needs to be examined further. Restorationists are unanimous that the offender be acknowledged and admitted as a 'stakeholder' into the restorative process. However, such 'stakeholder' status may be attained only after a 'plea of guilty' by the offender. The co-operation which is envisioned for the restorative process is premised upon a prior acknowledgement of guilt by one of the primary 'stakeholders'. Restorative justice does not comprehend the 'plea of not guilty'.<sup>99</sup> One may enter the restorative process as an offender, but not as an accused. The condition of being an accused is too ambiguous and undetermined for it to be accommodated within the restorationist enterprise. Restorative justice requires

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99 See Acorn op cit 62: 'Restorative justice provides the opportunity and the inducement for offenders to come out and speak up. It deals only with offenders who "admit it". Though our traditional rules of evidence distrust and discourage confessions induced by offers of advantage, the recruiting of offenders into restorative justice programs is based squarely on such incentives. Restorative justice exchanges mercy for conversation. See also Daly (2002: 57, original emphasis): 'For virtually all legal contexts involving individual criminal matters, restorative justice processes have only been applied to those offenders who have *admitted* to an offence; as such, it deals with the penalty phase of the criminal process for admitted offenders, not the fact-finding phase.' See further Delgado op cit 763.

and demands the certainty and clarity attaching to the offender. The accused must become the offender. The restorative process is viable only if this precondition is met. There has to be an admission of liability. Before anything else, the restorative process is a confessional.

Restorative justice cannot tolerate silence on the part of the accused. In order to have access to the benefits of the restorative process, the offender must forego his right to silence.<sup>100</sup> He must not insist upon proof of his guilt. He cannot invoke the presumption of innocence. These are key and hard-won rights in the history of criminal justice. Despite their subsumption in conventional criminal procedure, they represent a historic victory over the caprices of class justice. For the unrepresented accused,<sup>101</sup> the right to remain silent may well be the only shield against the rapacity of a conviction-hungry criminal justice system. The presumption of innocence may be all that protects such an accused against the presumption of criminality which routinely attaches to members of the 'dangerous classes'.

Restorative justice appears to have excised the very notion of the accused and, thereby, the recalcitrant accused from its epistemology.<sup>102</sup> That is, it comprehends only the offender who, by his *mea culpa*, becomes a 'stakeholder' in the restorative process. The transfiguration of accused into offender is achieved by the forfeiture of the right to silence and the renunciation of the presumption of innocence. These do not have to be engaged because, according to the logic of the restorative process, they do not matter. The restorative process supposedly takes

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100 See Acorn *ibid*: 'In our tell-all, talk-show era, nothing is more despicable than remaining silent.'

101 In the capitalist context, the unrepresented accused is usually a member of either the proletariat or lumpenproletariat.

102 Some restorationists have also sought to 'transcend' the notion of crime itself. See Acorn *op cit* 175 endnote 51.

us beyond such criminal procedural concerns. The demise of the accused entails irrelevance for the traditional rights of the accused. However, these rights are too important to be sidelined summarily, as part of a dated and dispensable system of criminal procedure. In the context of capitalist society, the rights to silence and to be presumed innocent are inherently valuable, at least as hedges against arbitrariness.<sup>103</sup> They do matter, at least to the accused person. And their trivialization needs to be justified.

The recalcitrant accused who, for whatever reason, including the possibility that he is innocent, refuses to co-operate in the restorative process, constitutes a challenge to the entire edifice of restorative justice. Such an accused is a subversive obstacle to restorative healing. Whereas they may have constructed valid objections to many other aspects of conventional criminal justice, the advocates of restorative justice do not appear to have developed any systematic criticism of the rights to silence and to be presumed innocent. It is submitted that unless and until restorative justice is able to account epistemologically for the accused who will not readily accept offender status, there is no good reason to believe that the restorative process renders redundant the right to silence and nugatory the presumption of innocence.

### **3.7.8 Class and the Victim**

The empowerment of the crime victim is a central concern of restorative justice. It is a restorationist first principle that the victim be installed in the restorative process as a primary 'stakeholder'. However, in capitalist society, victim empowerment may not always be the experience of healing, mutuality and respect which the advocates of restorative justice tell us it is. In the capitalist context, victim empowerment assumes an identifiable class texture. For the

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103 See Schwikkard (1999: 10-16).

victim who is a member of the dominant classes, victim empowerment is likely properly meaningful. He has access to both the material and cultural resources to become an agent in the restorative process. He has the capacity to participate fully in the process and thereby contribute to the elaboration of the restorative sanction. Eradication of and closure in relation to the negative effects of the crime are real possibilities. For the middle-or upper-class victim, then, victimhood can indeed be transformed into the valuable and positive resource which restorative justice wants it to be. There are no objective obstacles to his victimhood becoming a virtue to be celebrated. For such a victim, restoration of the *status quo ante* means a return to the undisturbed enjoyment of the benefits and privileges of a materially secure existence. Only individual psychological barriers may then prevent him from transcending his victimhood.

The empowerment of the victim who comes from the dominated classes is more problematic. He is a victim of oppression and exploitation before he is a victim of crime. His victimhood is structural first, conjunctural second. Restorative justice may well afford him, like his middle- and upper-class counterparts, the opportunity to recover his pre-crime position. However, for the proletarian victim, restoration of the *status quo ante*, even if complemented by a range of victim services, does not put an end to the victimhood inscribed in a proletarian existence. Restorative justice may resolve the conjunctural dimension of his status as a victim. However, it leaves intact the material conditions of his existence and hence the structural dimension of his victimhood. For the proletarian, victimhood is an existential condition. It is an existential curse.

Notwithstanding the efforts of the ideologues of capital to define the victim in atomistic terms, social class will have an impact, often a profound one, upon the construction of victimhood and upon the possibilities of transcending it. From the Marxist perspective, the empowerment of the victim is bounded by his class position. That is, the material conditions of the victim's existence determine the ambit of his empowerment. Restorative justice does not comprehend this elementary but signal relationship. It appears to accept the bourgeois notion of the autonomous victim, unencumbered by the incidents and inconveniences of social class. In other words, it operates in terms of a generic victim who has no specific class affiliation.

For Marxism, it is axiomatic that victim empowerment must mean different things to victims from different classes. For the victim who is a member of the dominant classes, restorative justice may well be a true solution. He is able to discard his victimhood and, healed and whole, to re-occupy his position in the dominion of his class. However, for the proletarian victim, the process of empowerment involves a quite different prospect. If he is re-inserted, healed and whole, into the capital-labour relation, it is always into a position of subjugation. A successful restorative encounter enables him to re-occupy his pre-crime position in the structure of exploitation of his class, free of the psychological and other problems which victimhood entails. Restorative justice repairs the damage caused by the crime, only to perpetuate the damage caused by the social relations of production of capitalism. For the working-class crime victim, then, victim empowerment is fundamentally contradictory: conjunctural empowerment becomes a resource of structural disempowerment.<sup>104</sup>

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104 There is some restorationist acknowledgement of the inability of restorative justice to alter material conditions. See Braithwaite (2003a: 57): 'Restorative justice cannot resolve the deep structural injustices that cause problems like hunger.' See also Crawford op cit 123: 'Ultimately, however, it is social and economic policies (including employment, education, health and housing) rather than criminal justice policy that should remain the primary vehicle for the construction of a just and equal social order.'

### 3.7.9 Class and the Offender

Restorative justice seeks also to reconstruct the offender. The intention is that, by collaborating with the victim and the community in the restorative process and the construction of the restorative sanction, the offender not only repairs the damage he has caused but also undergoes a process of reformation and regeneration, in terms of which he chooses to desist from causing further criminal damage and to become a caring and productive member of society. Restorative justice is thus meant to be the salvation not only of the victim but also of the offender. However, like its concept of the victim, the restorationist approach to the offender makes no overt allowance for influence of social class. In capitalist society, an offender's class always precedes his criminality. The restorationist ambition to reconstruct him must therefore be understood in relation to the position he occupies in the class structure.

For the bourgeois or petite bourgeois offender, the restorative process is a way of reconciling with his class. He is in disrepute with his class comrades. He is an offender not only because he has committed a crime but also because he has offended the sensibilities of the respectable majority of his class. His reconstruction grants him access once more to the benefits of his class position. He resumes his place alongside his class brethren on one side - the side of plenty - of the capital-labour relation. There is no good reason why he should resist reconstruction. Whatever life changes he may undergo or have to undergo reduce, ultimately, to his reintegration into the entitlements of his class. For the proletarian offender, restorative reconstruction also means a return to his prescribed position in the class structure. However, unlike his upper-class counterpart, he does not return to a cornucopia of advantage. He does not even recover a relatively secure existence, as does the reconstructed middle-class



offender. Instead, what he can expect are the self-same conditions of deprivation which constituted the material context of his lapse into criminality.

The reconstruction of the proletarian offender via the restorative process is in effect his re-socialization into the bourgeois order of things. He learns to acquiesce in the capital-labour relation and to accept his place of subjugation in it. The offender is reconstructed when he once again reconciles himself to his subaltern social status and accedes to the material conditions of the exploitation of his class. His negation as a criminal offender coincides with his submission to the ideological hegemony of the bourgeoisie. His crime had exposed him to be ill-disciplined and intolerant of the regulatory demands of the capitalist production process which govern proletarian life. Restorative justice shows him the error of his ways. He confesses his trespasses, and he undertakes to become a restrained and constructive member of society, and not to offend again. He consents to that which is as that which ought to be, and finds his salvation in yielding to the disciplinary regimen to which his class is subject.<sup>105</sup>

However, the reconstruction of even the most well-intentioned, remorseful and obeisant offender may founder for lack of resources. Implementation of the restorative sanction is here, as in all contexts, crucially dependent upon the availability of material means. An intellectual or emotional commitment by the

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105 See Foucault (1977: 135-169) and Melossi (1979). Despite the antagonism of restorative justice to criminal justice, it would appear that the former involves a discernible strain of the Foucauldian discipline which has come to be identified with the latter. Reconstruction of the offender is, in this regard, a disciplinary process aimed at securing offender docility in the face of bourgeois class power. See Minor & Morrison (1996: 126-127): 'Foucault's perspective challenges the uniqueness of restorative justice philosophy and indicts its effects. Distinctions between restorative justice and traditional corrections become difficult to sustain. According to Foucault, political domination through discipline is the essence of any form of behavioral regulation. Restorative practices promote discipline and normality by teaching offenders how to communicate, compromise, empathize, repair wrongs and so forth. Foucault's ideas are therefore a reminder that despite whatever else restorative justice might be, it is still a way of exercising power and social control.'

offender to a crime-free life is necessary, but not sufficient. Implementation requires, at least, that the offender have access to the necessities of life and that he has the right and the opportunity to work. In other words, the reconstruction of the offender cannot be achieved in the sphere of the ideational only. It must have a foundation in the material world. Here, again, the class position of the offender is critical. Needless to say, the resource base of the bourgeois and petite bourgeois offender is much more extensive than that of proletarian and lumpenproletarian offender. The reconstruction of offenders from the dominant classes is thus likely to encounter significantly fewer hiccups than that of offenders from the dominated classes.<sup>106</sup>

The problem of resources is urgent in a capitalist context, where criminality is a mass phenomenon. Every day more and more working-class men, women and children are thrust into the criminal ranks as a result of the unending socio-economic crisis which constitutes their lives. It is inconceivable that the restorative process can reconstruct even one tenth of these criminal masses if the conditions which spawned their criminality continue to be reproduced as the material context of their reconstruction. Any programme of restorative justice can only be as successful as the material resources with which it has to work. Late capitalism is penurious towards the proletariat. It has, to a large extent, survived the structural crisis of accumulation and profitability which has plagued it for years now by assaulting the living standards of the proletariat. Restorative justice

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106 See Levrant *et al* op cit 16: '[T]here may be class and thus racial differences in the ability of offenders to meet the conditions of restorative sanctions ... The most obvious example is the requirement of providing victims with restitution – a common feature of restorative sanctions – which may be difficult for disadvantaged offenders to fulfill. On a broader level ... it seems likely that affluent offenders will be more able to draw on family supports (e.g., private drug treatment, parental monitoring) to meet the conditions imposed by restorative sanctions. If so, then larger inequalities in society are likely to be reproduced within the framework of restorative justice.' See also Delgado op cit 768: 'Nothing is wrong with requiring persons who have harmed others without justification to make restitution. But forcing a needy person who has stolen a loaf of bread to do so is regressive, unless accompanied by measures aimed at easing his poverty.'

needs for capitalism to invest in the welfare and well-being of the dominated classes, at least. This it cannot or can no longer do. The decadence of the capitalist mode of production is thus a major obstacle to the reconstruction of the offender, and hence to the success of the entire restorative justice project.

### 3.8 Conclusion

The claims of restorative justice in its comprehensive version are simultaneously radical and reactionary. It is radical in its anti-statism. No other criminological tendency has gone as far as restorative justice to reject the role of the state as an agent of criminal justice.<sup>107</sup> A proposal to privatize crime and sideline the state is truly radical in the context of capitalism. It calls into question the structure of the mode of production and portends a justice paradigm which is practicable only outside the parameters of capitalism.

Restorative justice is, however, profoundly reactionary in its adherence to the tenets of functionalism. It is concerned to restore a supposedly pre-given community equilibrium disrupted by the crime. The restorative process includes the empowerment of the victim and the reconstruction of the offender. Both are thereby meant to become productive members of a peaceful and functioning community. Crime is a pathological blight upon community cohesion. It introduces conflict into a situation which was harmonious. The task of restorative justice is to restore that harmony, via the active collaboration of the restorative triad of victim, offender and community in the construction of the restorative sanction.

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107 See Crawford & Clear op cit 141: 'Much of the community justice and restorative justice literature is infused with an explicit, and sometimes implicit, antistatism. It is no coincidence that the rise of restorative justice and the ascendancy of neo-liberal ideology have unfolded simultaneously. They both proclaim an end to universality and state monopoly and imply a privatization of disputes and justice by prioritizing private and parochial forms of control.'

*Prima facie*, this is a progressive agenda. However, its classification as conservative is defensible on the basis that restorative justice has failed conspicuously to comprehend the true character of the social relations of production of the capitalist mode of production. It has failed to appreciate the deep class fissures which run through the heart of every capitalist social formation. It has failed to understand that conflict, not consensus, is the defining characteristic of every class and hence of every capitalist society, regardless of how peaceful that society may appear to be. And it has failed to discern the crucial role of the state in the reproduction of capitalist social relations.

These are fundamental omissions. They betoken epistemological errantry and analytical feebleness which render restorative justice vulnerable to the incursions of bourgeois ideology. Thus, the restorationist aspiration to restore community equilibrium amounts, objectively, to an aspiration to restore the standard configuration of capitalist class rule. The crime has disturbed the normalities of the capital-labour relation, and the restorative process is a means of recovering the established contours of that relation. In this connection, restorative justice is inculcated in the bourgeoisie's ideological project to universalize its particular class concerns as general social concerns. The principle of community restoration thus reduces to an imprimatur for capitalist class rule.

The other two elements of the restorative triad, namely, the victim and offender, are similarly contaminated with the values of the bourgeois ideological scheme. Restorative justice essentially reconciles them to the operational matrix of the capital-labour relation. As a 'stakeholder', each is led, via the restorative process, to a position of accommodation with capitalism. Both are transformed

into 'productive' members of their communities, that is, they are able to transcend the debilitation of the crime and to take up or resume an active role in the capitalist production process.

Whereas its reactionary aspect is encouraged by the capitalist milieu, the radical aspirations of restorative justice are unattainable within that milieu. Capitalism requires its state to be at the centre of its justice system, and cannot tolerate an adjudicatory system which is organized around a privatized notion of crime.<sup>108</sup> The anti-statism of restorative justice fails to comprehend this basic proposition. Restorative justice in its comprehensive version is thus not a serious possibility in any capitalist social formation. At best, capitalism can accommodate and will permit, perhaps even encourage, the partial version of restorative justice, as an appendage to the criminal justice system. Thus, insofar as restorative justice is practicable in capitalist society, it must abandon its radicality and acquiesce in the reactionary imperatives of the law of value and the capital-labour relation. Such is the import of its existential dialectic.

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108 See Chapter Five below.

## CHAPTER FOUR

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## Chapter Four: The Theory of Restorative Justice

This chapter engages the theory of restorative justice. Ultimately, a practice stands or falls by the theory which informs it. The advocates of restorative justice have, however, tended to be lukewarm about grounding their practice theoretically. Despite the fact that restorative justice is first and foremost a new theory of justice, the bulk of restorationist literature is noticeably atheoretical. ‘Restorative justice is practice-led in most of its manifestations.’<sup>1</sup>

This tendency to atheoreticism ought not to surprise. Ours is a postmodern (and ‘post-Marxist’) world in which the demise of ‘grand theory’ is a cause for celebration. As a postmodern jurisprudence, restorative justice is concerned much more with the exemplary story than with the theory of justice.<sup>2</sup> Hence, although the literature of restorative justice has grown exponentially in recent years, very little of it is expressly theoretical. The overtly theoretical works tend to have been written relatively early in the short history of restorative justice, by the first generation of proponents. Thereafter, it appears, theory took a back seat as restorative justice settled into promoting its cause by refining its operational principles.

Three works are analysed in this chapter. They are *Conflicts as Property* by Nils Christie, *Not Just Deserts* by John Braithwaite & Philip Pettit, and *The Practice of Punishment* by Wesley Cragg. Each of these works theorizes restorative justice, either in its comprehensive or partial aspect. In the bibliography of restorative justice, they are prominent for being uncommonly but properly theoretical. Each work proposes a theory of restorative justice. That is,

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1 Ashworth (2002: 579).

2 See Daly (2002: 67-68). See Chapter Six below for an analysis of the relationship between restorative justice and postmodernism.

each seeks to delineate a set of epistemological axioms for restorative justice and to elaborate a systematic conceptual structure for it. Each offers a comprehensive explanation of the claims of restorative justice, less from its basic concepts than from the postulates in terms of which those concepts are organized. Few restorationist writings are grandly theoretical in this sense. Most are theoretically modest and content with the occasional theoretical assertion in support of advocacy efforts. However, because the claims of restorative justice are grand, it is meet that its theory be grand also. Hence the focus in this chapter upon the wide-ranging theories espoused in the designated trilogy.

#### 4.1 Christie: *Conflicts as Property*

The Norwegian criminologist, Nils Christie, may justifiably lay claim to being the theoretical founding father of the restorative justice movement. In his 1976 Foundation Lecture of the Centre of Criminological Studies at the University of Sheffield, he proposed a theory of criminal justice which has since come to be genetically identified with restorative justice. The lecture, published under the title *Conflicts as Property*, is easily the most quoted single piece in the burgeoning corpus of restorationist literature. Certainly, and despite the fact that it contains no references to restorative justice, references to *Conflicts as Property* abound in restorationist literature and its arguments have ‘become a modern orthodoxy amongst RJ supporters’.<sup>3</sup> Before any other work, it may be considered to contain *the* fundamental theoretical premises of restorative justice.<sup>4</sup>

Christie begins his argument with the somewhat surprising assertion (although no commentators have remarked thus upon it) that modern society is characterized by too little conflict:

3 Ashworth (2003: 171). Chapter Five below contains further references showing Christie’s importance to and popularity within the restorative justice movement.

4 Indeed, it is argued in Chapter Five below that Christie’s theory ought to be acknowledged as the definitive theory of restorative justice.



‘[O]ur industrialised large-scale society is not one with too many internal conflicts. It is one with too little.’<sup>5</sup>

This is a surprising proposition because it is an analytical truism that every ‘industrialised large-scale society’ to which Christie refers is in fact a capitalist society, which is structured by class conflict. Socio-economic contradiction is endemic to the capitalist mode of production, and every capitalist social formation is permanently rent by class struggle.

Christie is, of course, not ignorant of this fact. Thus he readily acknowledges the existence of class conflicts in contemporary capitalist society,<sup>6</sup> and he alludes to ‘the state's need for conflict reduction’.<sup>7</sup> His claim of a dearth of internal conflicts in contemporary society must, to be valid, therefore be a reference to a different type of conflict. Class conflicts are generally comprehended at a fairly high level of abstraction, typically that of the social formation, or perhaps the mode of production. The conflict to which Christie refers must be located at a level of abstraction lower than that of the social formation or even the classes which comprise a social formation. It appears that when he laments the shortage of conflicts, he is in fact alluding to conflicts at the inter-personal level. It is the conflicts between ‘directly involved parties’<sup>8</sup> which are scarce in modern society. And he attributes this scarcity to the operation of one main factor, namely, theft. According to him there are too few such conflicts in our society because they have been stolen, mainly by professional thieves but also by structural thieves.<sup>9</sup>

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5 Christie (1977: 1).

6 Ibid 5.

7 Ibid 3-4.

8 Ibid 5.

9 Professional thieves are lawyers and other criminal justice professionals, such as treatment personnel. Structural thieves are attributes of the social structure. Both these types of thieves are discussed below.

Conflicts are capable of being stolen, Christie tells us, because they are a form of property. Every conflict begins its existence as the property of the parties who are directly involved in its creation. It belongs to them. But because our society is apprehensive of the destructive possibilities of conflict, we allow the parties to be dispossessed of their conflicts, that is, of their property. We want to see the conflict rendered harmless or transformed into non-conflict. Hence we allow in the professionals, to arrogate the conflict and resolve it.

The notion that conflicts, including criminal conflicts, are forms of property is, needless to say, the centrepiece of Christie's argument. It is the conflict generated by the criminal conduct of the offender which, to Christie, is valuable as property. And it is this valuable property which is stolen from the affected parties by justice professionals. Hence his concern to return the stolen property to its rightful owners or, rather, to halt its theft, so that the owners are able to deal with it as they see fit. Conflicts as property is thus about the direct parties being given the opportunity to benefit from their proprietary rights to and interests in their conflicts. Christie elaborates:

‘Material compensation is not what I have in mind with the formulation “conflicts as property”. It is the *conflict itself* that represents the most interesting property taken away, not the goods originally taken away from the victim, or given back to him. In our types of society, conflicts are more scarce than property. And they are immensely more valuable.’<sup>10</sup>

The theory of restorative justice depends crucially upon the idea that the criminal episode entails proprietary configurations and values which are fundamental to its resolution.

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<sup>10</sup> Christie op cit 7, original emphasis.

Christie's proprietary thesis is remarkable and subversive. It is remarkable in its efforts to intrude the idea of property into the question of crime and punishment. It is subversive in its implications for the traditionally public character of the capitalist criminal justice system. It amounts to a frontal assault upon the legitimacy of that system. Christie is arguing, essentially, that the criminal justice system, supposedly designed to resolve and prevent crime, has itself been constructed on the basis of the crime of theft. In other words, the criminal justice system is a product of the crisis of criminality it purports to solve. It is implicated in the crisis. The answer to this crisis, according to Christie, is to put an end to the theft and to leave all criminal conflicts in the possession of their true owners, who, as owners, have the capacity to resolve them in a way which no surrogate can.

He constructs an aboriginal state of ownership in relation to criminal conflicts. Offender and victim are co-owners of the crime in which they are involved. It is their natural property. They created it. It is valuable to them. But then the state and its agents intervene, to take it away from them or to define it away from them. Their property is confiscated.

‘Criminal conflicts have either become *other people's property* - primarily the property of lawyers - or it has been in other people's interests to *define conflicts away*.’<sup>11</sup>

The original owners of the crime and its consequences are dispossessed. The conflicts are either appropriated (by lawyers) or transformed into non-conflicts (by treatment personnel). The point is that valuable property is either stolen or destroyed, and in both cases lost to its rightful owners. The result is an insoluble crisis of criminality, because the parties best equipped to solve it are ejected or sidelined as parties.

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11 Ibid 5, original emphasis.

In addition to the professional thieves of criminal conflicts, Christie identifies a category of structural thieves. These are the 'changes in the basic social structure' which have promoted the dispossession of the owners of the conflicts.<sup>12</sup> He posits that these social changes are expressed in two types of segmentation:

- Segmentation according to space: In modern society we relate to one another as 'roles, not as total persons'. We migrate from role to role, in one-dimensional relationships, isolated from our fellows. This kind of segmentation is exacerbated by the 'extreme degree of division of labour' characteristic of our societies.
- Segmentation according to caste attributes: Modern societies are caste societies, in which people are segregated according to 'biological attributes such as sex, colour, physical handicaps or the number of winters that have passed since birth'. Of these biological attributes, age is the most important.

Christie postulates that segmentation leads to three consequences in respect of criminal conflicts:

- Social life is depersonalized, rendering us less able to cope with conflicts and encouraging us to give them away.
- Certain conflicts are destroyed 'even before they get going'. This applies especially to crimes against people's honour, which are highly personal, but which have decreased significantly in contemporary societies.
- Certain conflicts are rendered 'completely invisible'. This applies to crimes by the powerful against the weak, for example, wife- and child-abuse, and crimes by large organizations against individual victims.

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12 Ibid.

Social segmentation thus entails the theft of criminal conflicts, as they are disowned, destroyed or disguised under impact of the structural organization of modern society.<sup>13</sup>

Most commentators highlight the professional theft of criminal conflicts in Christie's argument. The structural theft of these conflicts, which he identifies and discusses in some detail, is seldom, if ever, even acknowledged. This is unfortunate, because the structural thieves are as integral to his argument as are the professional thieves. Unlike so many of his followers, Christie appreciates the fact that human action invariably takes place within a determinate structural context. Structural theft is the milieu of professional theft. It is the structural theft of criminal conflicts which serves to locate his argument historically, in the socio-economic constitution of modern capitalist society. Commentators who ignore or belittle the question of structural theft do Christie an injustice, and can hardly claim to represent his position adequately.

Much of what Christie canvasses in his analysis of structural theft may be subsumed under the Marxist concept of alienation. Marxism holds that capitalist social relations of production have the effect of robbing people of crucial components of their human potentialities. Humans are estranged from one another, from the products of their labour and from themselves. The imperatives of capitalist production and reproduction require that we be psychologically atomized, and that our relations with our fellow human beings be constructed according to our place in the division of labour, as determined by the exigencies of the world of generalized commodity production. In practice, this entails that we live our lives at an emotional distance from our fellows, in a one-dimensional

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13 Christie discusses structural theft on pages 5 to 7. The quotations used in my summary are all taken from these pages.

universe, and that our social connections are denuded of human content. We are each of us reduced to an estranged abstraction of our potential selves.<sup>14</sup>

When Christie describes the social segmentation which underlies the structural theft of conflicts, he is in effect describing the alienated social relations of the capitalist mode of production. He is not a Marxist and does not rely upon the concept of a mode of production as an analytical tool. Also, he prefers to comprehend the modern capitalist social divisions in caste rather than class terms. But he consciously links the theft of criminal conflicts to the structure of contemporary society. He tells us that it is the (capitalist) social structure which is responsible, in part at least, for the theft of criminal conflicts. This is a crucial insight. For it implies a crucial question: can halting the theft of criminal conflicts and hence solving the crisis of criminality occur within the structural parameters of our society? We shall return to this issue later.

For Christie, then, 'industrialised large-scale societies' are marked by the theft, professionally and structurally, of criminal conflicts. They are taken away or enticed away from the parties who own them and to whom they matter most. There is, in these societies:

'a process whereby conflicts have been taken away from the parties directly involved and thereby have either disappeared or become other people's property.'<sup>15</sup>

Christie contrasts this modern western pathology to the way in which pre-modern, non-industrialized societies perceive and resolve their internal conflicts. He chooses Tanzania as an example, and proposes to 'approach our problem from the sunny hillside of the Arusha province'.<sup>16</sup> He suggests that such societies are not plagued by the theft of criminal conflicts. They are structured in such a way as to

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14 See Ollman (1976: 131-135).

15 Christie op cit 1.

16 Ibid 2.

allow the immediate parties to participate directly in resolving all conflicts that arise. In other words, the segmentation which encourages the dispossession of the parties in modern societies does not exist in these societies. Also, there are no professionals to poach conflicts or to transform them into non-conflicts. All conflicts stay where they originated, to be resolved by the parties who matter, with help from their fellows as and when necessary.

Christie offers us the Tanzanian example as proof of the existence of an alternative way of doing justice, which does not involve the arrogation of conflicts either by the state and its agents, or by the structure of society. He goes further. He sees in the Tanzanian case an argument for the abandonment of the concept of criminal justice as we know it, that is, as a statist system, in favour of a civil law approach to criminal conflict resolution. Thus he says:

‘I have not yet made any distinction between civil and criminal conflicts. But it was not by chance that the Tanzania case was a civil one. Full participation in your own conflict presupposes elements of civil law. The key element in a criminal proceeding is that the proceeding is converted from something between the concrete parties into a conflict between one of the parties and the state. So, in a modern criminal trial, two important things have happened. First, the parties are being *represented*. Secondly, the one party that is represented by the state, namely the victim, is so thoroughly represented that she or he for the most part of the proceedings is pushed completely out of the arena, reduced to the triggerer-off of the whole thing ... The victim loses the case to the state.’<sup>17</sup>

Here Christie is intimating that the solution to the crisis of criminality must involve a move away from the ‘modern criminal trial’. The criminal justice system is structurally biased against the parties to a criminal conflict, especially the victim. He suggests that the interests of the parties would be served best if, instead of having to endure the indignities of the ‘modern criminal trial’, they were able to enlist the resources and norms of the civil law in the resolution of

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17 Ibid 3, original emphasis.

their conflict. Such a system would have to be anti-statist, in the sense that the state would have no role or, at best, a minor role as agent and party.

For Christie, criminal law as practised in the western industrialized world has 'reduced the victim to a nonentity and the offender to a thing'.<sup>18</sup> He seeks a criminal justice which is structured in terms of agency for victims and offenders. To this end, he refers us to the pre-industrial legal culture of village Tanzania, as representative of a system of conflict resolution which takes seriously the cares and concerns of the immediate parties. In such a system, both victim and offender come into their own. They are at the centre of the process of conflict resolution. It is their process. Others are allowed to participate only as 'resource-persons',<sup>19</sup> to facilitate the process, but never to commandeer it.

The Tanzanian model, then, is the key to the resolution of the contemporary crisis of criminality which plagues capitalist society. However, Christie no doubt realized that the simplistic transposition of a model from one material environment to another was a recipe for failure, even disaster. Any transposition had to be grounded theoretically, and had to be justifiable in relation to the structure of the recipient society. He thus needed a concept which would make the adoption of the Tanzanian model comprehensible in the context of contemporary industrialized societies and which rendered it adaptable to their structures. It is this consideration, it is submitted, which underlies his construction of conflicts as property. The credo of property is the ruling orthodoxy of capitalist society. Its reach is extensive and colours virtually every transaction and relation of any significance. The ideology of property is *the* defining ideology of Christie's 'industrialised large-scale societies'. His

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18 Ibid 5.

19 Ibid 12.



conception of crime in proprietary terms fits perfectly into this ideology, and provides the theoretical *ratio* which he required to endorse the Tanzanian model as alternative to the state-sponsored criminal justice system. Re-defining criminal conflicts as forms of property was his chosen way of modernizing the Tanzanian model, to meet the conditions of the contemporary world.

Christie does not argue that the Tanzanians conceive of their conflicts as property. He does argue that the Tanzanian case constitutes a participatory 'happy happening' compared to the dull, tedious and peripheral nature of the 'non-happening' that is the criminal trial in the western criminal justice system.<sup>20</sup> In other words, he does not posit, expressly at any rate, any necessary historical connection between conflicts as property and courts as happenings. His construction of conflicts as property is bounded by the structural specificities of capitalism. It appears that Christie considers that in order to transform capitalist criminal justice into a happening, it is necessary to transform criminal conflicts into forms of property.

In capitalist society participation is a scarcity.<sup>21</sup> The notion of criminal conflicts as property is, according to Christie, the key to resurrecting participation and reconstructing criminal justice as the 'happy happening' it ought to be. Thus he says:

'In this perspective, it will be easily seen that conflicts represent a *potential for activity, for participation*. Modern criminal systems represent one of the many cases of lost opportunities for involving citizens in tasks that are of immediate importance to them.'<sup>22</sup>

Conflicts constitute valuable property because they afford their owners the opportunity to become directly involved in their resolution. Ownership is the

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20 Ibid 2.

21 Ibid 7.

22 Ibid, original emphasis.

route to participation. The alienation which pervades daily life in the capitalist world can be overcome by giving all of us a stake in its proprietary regime. Christie is telling us that the solution to the capitalist crisis of criminality lies in ensuring that the owners of criminal conflicts are no longer dispossessed of their property.

The causes of the routine sidelining of crime victims by the criminal justice system are to be found in their dispossession and the theft of their conflicts.

‘The victim is a particularly heavy loser in this situation. Not only has he suffered, lost materially or become hurt, physically or otherwise. And not only does the state take the compensation. But above all he has lost participation in his own case. It is the Crown that comes into the spotlight, not the victim. It is the Crown that describes the losses, not the victim ... Something that belonged to him has been taken away from that victim.’<sup>23</sup>

Victims need to be reinstated as participants in the criminal justice system. But, according to Christie, the victim as owner is a precondition for the victim as agent. In other words, victims will return to the centre of the criminal justice process only if the conflicts into which they have been involuntarily drawn are treated as their property, to dispose of according to an arrangement which is negotiated by them, and not on their behalf by the state or its functionaries.<sup>24</sup>

The conquest of victimhood, according to Christie, requires that victims be guaranteed real proprietary rights in the conflicts which have rendered them victims. Ultimately, he wants to see the establishment of a system of neighbourhood courts which are victim-oriented. These would be courts:

‘where the victim's situation was considered, where every detail regarding what had happened - legally relevant or not - was brought to the court's attention. Particularly important here would be

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23 Ibid 7-8.

24 Ibid 11.

detailed consideration regarding what could be done for him, first and foremost by the offender, secondly by the local neighbourhood, thirdly by the state.<sup>25</sup>

All of this would be possible if the crime victim were transformed, via his ownership of his conflict, from an object to a subject of the criminal justice process.

Christie submits that for offenders, also, the recognition of criminal conflicts as property entails opportunities to participate directly in efforts at resolution:

‘The offender gets a possibility to change his position from being a listener to a discussion - often a highly unintelligible one - of how much pain he ought to receive, into a participant in a discussion of how he could make it good again. The offender has lost the opportunity to explain himself to a person whose evaluation of him might have mattered. He has thereby also lost one of the most important possibilities for being forgiven.’<sup>26</sup>

The latter problem disappears if the conflict is left in the possession of the immediate parties, as their property. The offender, as cause of the conflict, is thereby given a stake in its resolution. He is invited to possess it as his own so that he can make a material contribution to righting that which he has disturbed. As property owner, the offender is offered the chance to demonstrate the value of his proprietary rights in the conflict by applying them to the construction of a reparative response. The proprietary theory of criminal conflict is thus offered as the salvation of both the victim and offender.

However, whereas the victim is presumed to be a willing owner, Christie accepts that the offender may well be a most reluctant one. He acknowledges that offenders:

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25 Ibid 10.

26 Ibid 9.

‘prefer distance from the victim, the neighbours, from listeners and maybe also from their own court case through the vocabulary and the behavioural science experts who might happen to be present. They are perfectly willing to give away their property right to the conflict. So the question is more: are *we* willing to let them give it away? Are we willing to give them this easy way out?’<sup>27</sup>

Christie's answer is an unequivocal no. He believes that an offender does not have the right to give away, deny, abandon or abrogate his proprietary right in his conflict.<sup>28</sup> It is his permanently and indissolubly. It is inalienable. The offender must be obliged to act as owner and to participate in the resolution of his conflict, ‘quite independently of his wishes’.<sup>29</sup> He will be an active owner, whether he likes it or not. He has no choice in the matter. If needs be, he will be impressed into the making of a happening.

Christie takes his argument beyond the crime victim and offender. He contends that the appropriation of criminal conflicts by the state entails a significant loss also for society as a whole.

‘But the big loser is us - to the extent that society is us. This loss is first and foremost a loss in *opportunities for norm-clarification*. It is a loss of pedagogical possibilities. It is a loss of opportunities for continuous discussion of what represents the law of the land.’<sup>30</sup>

Lawyers, Christie tells us, possess a ‘trained incapacity in letting the parties decide what *they* think is relevant’.<sup>31</sup> Legal professionals set limits to what matters legally in any criminal conflict. Invariably this is very different from or represents only a fraction of what matters to the parties who are directly involved in the conflict. Lawyers are trained in curtailing conflicts while the parties usually

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27 Ibid 9, original emphasis.

28 Ibid, footnote 2. Christie derives his position from John Locke's postulate that one possesses a proprietary right in one's own life which cannot be alienated.

29 Ibid.

30 Ibid 8, original emphasis.

31 Ibid, original emphasis.

wish to expand them in order to make sense of them. The criminal justice system thus forecloses debate which engages with and disapproves of lines of enquiry which probe the delimitation of its parameters.

Christie objects to the closed nature of contemporary western legal systems, where parties are routinely gridlocked into legal norms which have little bearing on their real interests and which show little comprehension of their real concerns. Once more he refers us to a 'non-western' system which is not as normatively exclusionary and hence not as affectively impervious to the immediate parties as ours. He explains:

'Maybe Barotse law ... is a better instrument of norm-clarification, allowing the conflicting parties to bring in the whole chain of old complaints and arguments each time. Maybe decisions on relevance and on the weight of what is found relevant ought to be taken away from legal scholars, the chief ideologists of crime control systems, and brought back for free decisions in the court-rooms.'<sup>32</sup>

He identifies a 'further general loss'. He suggests that the loss of 'possibilities for personalised encounters' between victim and offender reinforces the misconceptions which each has of the other.<sup>33</sup> The answer is to keep the state and its agencies and functionaries away from criminal conflicts. We - civil society - are, according to Christie, capable of dealing with criminal conflicts, treated as our property, without the interventionist assistance of the state or of criminal justice professionals.

When all is said and done, Christie is petitioning for a criminal justice system that is radically different from that which we have in contemporary capitalist society. He is urging a system which is structured in terms of the concerns and expectations of the parties who are directly involved in the criminal

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32 Ibid.

33 Ibid 9.

episode, namely, the victim, the offender and the community or local neighbourhood. In addition to being victim-oriented, courts should also be lay-oriented. Thus he says:

‘The ideal is clear; it ought to be a court of equals representing themselves. When they are able to find a solution between themselves, no judges are needed. When they are not, the judges ought also to be their equals.’<sup>34</sup>

This latter proposition necessarily entails the expulsion of the state and its functionaries from the larger part of the criminal justice process. Whenever professionals are involved, they should function only as resource persons. ‘They might help to stage conflicts, not take them over.’<sup>35</sup> Christie considers that we have much to learn from the legal systems of pre-modern, non-industrialized countries, where justice is fully participatory for those directly involved in conflict. He is eager to see that the criminal justice systems of contemporary industrialized, that is, capitalist societies be reconstructed along such participatory lines.

Such then is the Christie thesis. The solution to the capitalist crisis of criminality consists in a re-definition of criminal conflicts as property in the context of a criminal justice system which is structured according to the participatory desiderata characteristic of agrarian communities which, if not pre-capitalist, are located on the capitalist periphery.

## 4.2 Critique of Christie

Christie's theory is coherent. It is logically consistent and does not contain any glaring contradictions or disjunctive lacunae. The most predictable problem is the recalcitrant offender. Christie has pre-empted this potential obstacle by

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34 Ibid 11.

35 Ibid 12.

postulating that the offender is umbilically attached to his proprietary rights in the conflict which he created, and has no right to dispose of them. It may be accepted that, on its own terrain, the Christie thesis is theoretically unassailable. The critique which follows is thus an external critique, in the sense that it does not seek to confront the internal ratiocination of the thesis.<sup>36</sup> That would be a futile exercise. Rather, it engages the philosophical premises and political assumptions upon which Christie relies, in an attempt to show that his thesis is ultimately indefensible where it matters most: in practice.

It has already been noted that Christie advocates a radical reconstruction of the criminal justice system and that such a reconstruction can occur only at the expense of the capitalist state, which is the prime protagonist in the current system. For the direct parties to be empowered the state must needs be disempowered. However, the capitalist state is the pre-eminent institution of the political organization and social cohesion of the bourgeoisie. Its proposed eviction from the criminal justice system cannot be summary. Such a campaign has to be justified, in terms which either affirm the social relations of production for which the capitalist state stands as guarantor or which anticipate the transcendence of these relations.

Christie opts for the former road. He never takes issue with the legitimacy of the capitalist mode of production or its structural attributes. He accepts as uncontroversial the existence and persistence of capitalist social relations of production. For him, one may say, capitalism is a given. It is a constant. When he postulates the transformation of criminal conflicts into property he means capitalist property. He is concerned only to question the legitimacy of the criminal justice system within the parameters of the capitalist system. He knows,

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36 The analysis of the theoretical offerings of Braithwaite & Pettit and Cragg undertaken later in the chapter will also proceed as external critiques.

as everyone does, that the state-centred criminal justice system has lost the bulk of whatever legitimacy it may once have enjoyed. He proposes to rekindle that legitimacy by shifting its locus from the state to property, from the public to the private.

At this point we need to examine more closely exactly what Christie means when he classifies criminal conflicts as property. Nowhere does he provide a definition of property. Sometimes he appears to understand property as private property. Thus he talks about the victim being dispossessed of ‘something that belonged to him’;<sup>37</sup> and of offenders giving away ‘their property right to the conflict’.<sup>38</sup> At other times, however, he expressly rejects the idea of conflicts as private property:

‘One of the major ideas behind the formulation ‘Conflicts as Property’ is that it is neighbourhood-property. It is not private. It belongs to the system.’<sup>39</sup>

It seems, then, that Christie subscribes to a hybrid notion of conflicts as property. The nature of the conflict as property is dependent upon the relevant owner. Christie identifies three co-owners of the criminal conflict: the victim, the offender and the neighbourhood. A criminal conflict, it appears, is private insofar as it belongs to the victim and offender. It is not private insofar as it is neighbourhood property, belonging to the system of neighbourhood courts which Christie sees as a necessary aspect of the solution to the crime question.

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37 Christie op cit 8.

38 Ibid 9.

39 Ibid 12. See also Christie (ibid 11), where he speaks of conflicts as ‘property that ought to be shared’. Crawford (2002: 104-105) relies upon this aspect of Christie’s notion of property to contend that ‘a careful reading’ of Christie shows that ‘he is not advocating a privatization of disputes’ and that ‘the state retains a vital role balancing the interests of the different parties’. However, my analysis which follows shows that, despite reading him carefully, Crawford has also misread Christie. It would appear that Crawford’s interpretation has much more to do with his own support of partial restorative justice than with what Christie actually says.



On the face of it, the notion that a criminal conflict, as property, is simultaneously private and not private appears contradictory, even illogical. The conventional notion of property in the capitalist world is that it is private and that its private nature entails the exclusion of all non-owners from asserting proprietary rights over it, or deriving advantage from it without the consent of the owner. Christie's property postulate certainly does not accord with conventional wisdom. But, then, it is not supposed to. He is grounding his argument in a type of property which is non-standard in the capitalist context, namely, common property. When Christie declares both that a criminal conflict is not private property and that it is the property of victim and offender, he is, it is submitted, referring to a species of capitalist property which is located outside the classically private. He is thereby broadening the ambit of the capitalist property regime beyond its traditional parameters to include common property. But, importantly, it is a common property to the benefits of which individuals have enforceable claims. In other words, and in concurrence with the individualist catechism of the bourgeois world, it is a common property demarcated in terms of individual rights. For Christie, then, a criminal conflict is a form of common capitalist property in which all directly involved parties enjoy individual rights.

There is, in this regard, a concordance between Christie's position and the work of MacPherson who, at the time, was making similar submissions about capitalist property in general.<sup>40</sup> MacPherson argues that private property, as 'an exclusive, alienable, "absolute" individual or corporate right in things'<sup>41</sup> was typical only of the early, developing stage of capitalism. Mature capitalism does not need an exclusively private concept of property as a right to things, and since the middle of the 20th century:

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40 Christie does not acknowledge expressly any debt to MacPherson. This is not surprising, since *Conflicts as Property* is a lecture in which one does not normally expect detailed references and acknowledgements. However, MacPherson's *Political Theory of Possessive Individualism* is included in Christie's list of sources and is referred to in one of the only three footnotes appended to the lecture.

41 MacPherson (1973: 127).

‘property is again being seen [as in the pre-capitalist epoch] as a right to a revenue or an income rather than as rights in specific material things’.<sup>42</sup>

MacPherson forecasts that the notion of capitalist property will be broadened further to include, ultimately, the ‘right to a kind of society or set of power relations which will enable the individual to live a fully human life’.<sup>43</sup>

The crux of MacPherson's argument is twofold: firstly, that capitalist property is not to be conceived solely as rights in material things; and secondly, that capitalist property is not to be equated exclusively with private property. Capitalism is capable of accommodating a notion of property that goes beyond rights in material things. These include the right to a job, the right of access to the means of labour, the right to a share of political power, and the right to the means of a fully human life. Capitalism is also able to incorporate property that is not exclusively private. Common property, which entails rights not to be excluded from its use or benefit, is the typical example here.<sup>44</sup> MacPherson thus seeks to expand the idea of capitalist property and thereby to transcend the limitations of form traditionally associated with it. However, although he champions a wide concept of capitalist property he is insistent upon one thing, namely, that capitalist property is ultimately about rights vested not in groups or collectivities but in individuals. This is true also and even of common property, which he defines expressly as an individual right not to be excluded from the use or benefit of said property.<sup>45</sup> In the final analysis, for MacPherson, capitalist property, whatever its form, is ‘a valuable individual right’.<sup>46</sup>

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42 Ibid 131.

43 Ibid 136.

44 Ibid 134.

45 Ibid 124.

46 Ibid 137.

Christie, it is submitted, replicates the essentialia of the MacPherson thesis in his construction of criminal conflicts as property. Thus, his argument that conflicts are a species of property is clearly based upon the idea that property does not consist merely of rights in material things. Also, his proposition that conflicts are common property is derived from the notion that modern capitalism does not require an exclusively private property regime. What is more, Christie's apparent vacillation between conflicts as private property and neighbourhood property is an expression of the view that, under capitalism, common property too is an individual right. There is an unmistakeable and intimate affinity between the MacPherson and Christie theses. The latter is essentially an extension and application of the former to criminal conflicts. Both see in capitalist property the key to the solution of the specific problems they are addressing.

This last point requires elucidation. MacPherson addresses the problem of democracy. He argues for an extensive concept of capitalist property because he perceives it as the road to real democracy, where property is the basis of the 'broader claims' to a set of social relations<sup>47</sup> which will 'enable individuals equally to use and develop their human capacities'.<sup>48</sup> Indeed, he considers that the quest for a properly free and fully human life must, in the conditions of contemporary capitalism, necessarily be informed by the spirit of property. He explains:

'I am suggesting that the broader claims will not be firmly anchored unless they are seen as property. For, in the liberal ethos which prevails in our liberal-democratic societies, property has more prestige than has almost anything else. And if the claims are not brought under the head of property, the narrow idea of property will be used, with all the prestige of property, to combat them.'<sup>49</sup>

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47 Ibid 138.

48 Ibid 122.

49 Ibid 138.

MacPherson appreciates fully the complete dominance of property in the ideological life of every capitalist social formation. He considers its authority to be so comprehensive and absolute that the only feasible way of obtaining satisfaction of the broader claims of real democracy is to construe these claims in proprietary terms. Any other strategy will invariably founder before the omnipresent might and resistance of capitalist property. For MacPherson, capitalist property in its extended aspect is the only road to true democracy. Property will permit no other way.

Christie's approach to criminal justice reproduces the fundamentals of MacPherson's position. He seeks a criminal justice system that is properly human, that is, dedicated and responsive to the needs and expectations of the people who matter. He considers that the key to his search is property. If criminal conflicts are treated as property they will become amenable to solutions which address the affected people as human agents. For him, too, capitalist property in its extended aspect is the road to restorative justice.

Christie never professes that the 'broader claim' of restorative justice must necessarily be made in proprietary terms. But he does make an unequivocal theoretical choice in this regard. And he does so because, like MacPherson, he understands the almost religious attachment which the bourgeoisie has to the institution of property. A populist property credo is the ideal justification for his programme.

As intimated earlier, Christie's solution to the capitalist crisis of criminality hinges upon the ousting of the state from its command position over the criminal justice process. However, in the context of the structure of the capitalist mode of production, this is a radical step. Christie's construction of criminal conflicts as

property is, in this connection, an inspired piece of theorizing. The nature of capitalist production requires a property regime which is not overly encumbered by statist constraints. Hence, while capitalist property is sacrosanct, the rights of the owner to transact with his property as he sees fit are largely immune from state intervention or control. The owner enjoys more or less absolute dominion.<sup>50</sup> It is this freedom of property, as an attribute of ownership, which is central to Christie's thesis. For it implies that the owners of a criminal conflict are legally entitled, *qua* owners, to dispose of it as they see fit, without reference to or without the oversight of the state.

Christie is proposing a theory of criminal justice which is a logical extrapolation of MacPherson's theory of property in the epoch of late capitalism. It entails a radical rejection of the formal statist criminal justice system which has hitherto been emblematic of capitalism. If a criminal conflict is a form of common capitalist property, then the state has no legitimate interest in its resolution. The disposition of a criminal conflict is then within the competence of its joint owners, all of whom enjoy it as an individual right. The Christie road thus leads to the privatization of criminal justice, in which the state has no or, at best, a minor role as party. Christie believes that property brings justice. He sees in the construction of the criminal conflict as property the key to satisfying the claims of the direct parties to a responsive criminal justice system. He considers this route to justice important enough to impose upon unwilling offenders. In the Christie scheme of things, our transformation into property owners and our participation in the new dispensation will be an enforced one, if necessary.

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50 See MacPherson *ibid* 126: 'Modern private property is indeed subject to certain limits on the uses to which one can put it: the law commonly forbids using one's land or buildings to create a nuisance, using one's goods to endanger lives, and so on. But the modern right, in comparison with the feudal right which preceded it, may be called an absolute right in two senses: it is a right to dispose of, or alienate, as well as to use; and it is a right which is not conditional on the owner's performance of any social function.'

From a Marxist perspective, the Christie postulate is a sophisticated attempt to devise a solution to the capitalist crisis of criminality in terms which proceed from an acceptance of capitalist social relations of production as licit and legitimate. It is, in other words, an exercise in capitalist reconstruction, considered necessary to deal with a problem which has overrun the extant regulatory arrangements. In this regard, Christie's thesis, albeit unambiguously radical, is also eminently and unassailably petite bourgeois in character and aspiration. He is committed to the central ideal of petite bourgeois political philosophy, namely, a society of property owners.

For the petite bourgeois, property is both his gateway to the bourgeois world and his bulwark against the threat of proletarianization. Christie raises this middle-class neurosis to the level of a theory. He would replace the state with that which the state exists to warrant. He would substitute the central juridical feature of capitalism for its central political feature in the constitution of the criminal justice system. While reducing the sway of the latter he would extend significantly that of the former, to include criminal conflicts. Christie is offering a solution to the capitalist crisis of criminality which, to be sure, spurns all conventional assumptions about the composition of the criminal justice system but which, as surely, embraces all the conventional assumptions about the composition of the social system. He is the petite bourgeois radical *par excellence*. His thesis is bold and sweeping but completely compatible with the bourgeois view of the world and the material conditions which sustain it.

MacPherson tells us that 'all roads lead to property'.<sup>51</sup> He forgets to add that all property leads to the commodity, that elemental cell of capitalist production. In the capitalist mode of production, property relations are the juridical form taken by commodity relations. To widen the ambit of capitalist

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51 Ibid 121.

property is to widen the sphere of influence of the commodity. Thus, when MacPherson construes democracy and Christie justice in terms of property, they are each performing an act of commodification. MacPherson is commodifying political relations and Christie legal relations. The process of commodification is an exercise in internal colonization, which widens and deepens the proprietary content and culture of the capitalist mode of production at every step.

When MacPherson and Christie present capitalist property as a catholicon in their respective theories, they are both objectively advancing the cause of capitalism and its bourgeoisie. Both display an unnecessary obeisance to the ubiquity and perceived omnipotence of property. It is true that each of them expresses some form of dissatisfaction with the limitations encoded in the idea of private property. But both of them are concerned to liberate capitalist property from these limitations, to broaden its reach beyond the exclusively private, and thereby to ratify the kingdom of property. However, there is no logical link, not even in formal logical terms, between the supreme prestige enjoyed by property in the capitalist world and according property the supreme status of theoretical panacea. Such a link can be made only on the assumption, which would be an ontological choice, that capitalism and its worldview are, if not desirable, then certainly not impugnable.

There is, as argued in Chapter Two, a quite remarkable coincidence between Christie's notion of conflicts as property and the precepts of popular capitalism. His thesis is, essentially, popular capitalism juridified. He would have us all transformed into property owners, at least of our conflicts. Each of us would be given a proprietary interest in a new criminal justice system. In the same way as the ideologues of popular capitalism promise that capitalism can be a people's mode of production, so Christie promises that criminal justice can be a people's mode of justice. The solution to the capitalist economic crisis, according to the

popular capitalists, is to invite all of us to participate in the magic of the free market. The solution to the capitalist crisis of criminality, according to Christie, is to offer all of us title in a populist property regime of criminal conflicts.

It appears that Christie perceives that the remedial attributes of capitalist property go beyond the problem of crime and may in fact rank as a crucial factor in solving the problem of capitalist alienation.<sup>52</sup> As is evident from his discussion of the structural theft of criminal conflicts, Christie is fully cognizant of the alienated and alienating nature of capitalist social relations of production. Following MacPherson's faith in the liberating and humanizing potentialities of capitalist property, he suggests that his own proprietary theory of conflict may contain the ingredients for vanquishing alienation. He posits that 'much of our trouble stems from killed neighbourhoods or killed local communities', and informs us that the transformation of criminal conflicts into neighbourhood-property:

'is intended as a vitaliser for neighbourhoods. The more fainting the neighbourhood is, the more we need neighbourhood courts as one of the functions any social system needs for not dying through lack of challenge.'<sup>53</sup>

For Christie, then, property as conflicts not only holds the key to solving the capitalist crisis of criminality but also constitutes a way out of the structural sources of capitalist alienation. This is a large claim. Of course, it sidesteps the larger prior question: why are our communities and local neighbourhoods 'killed'? The answer is painfully obvious: they are the victims of the exploitation, oppression and alienation inscribed in the social relations of production of the capitalist mode of production. Yet Christie would rely upon an expanded notion of capitalist property, the juridical heart and ideological soul of the capitalist

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52 Here Christie appears to concur with MacPherson's idea of property as the ultimate right to a fully human life.

53 Christie op cit 12.



mode of production, as their salvation. He proffers his conceptual transformation as the begetter of a social transformation.

Marxism considers that capitalism does not and cannot possess those resources which are required to solve its own structural crises, and that it has long ago become necessary to dismantle capitalism as a mode of production to prevent it from eventually plunging all humanity into social anarchy and cultural barbarism. Christie demurs. Despite his concerns about the inequities which it has produced, he continues to believe that capitalism can offer equal opportunities to all. Despite his attack upon the role of the capitalist state in the criminal justice system, he continues to believe that the capitalist system is able to provide a justice which is properly responsive to human needs and concerns. Despite his radicality, he shares the bourgeois worldview and continues to believe that capitalism is able to solve its own crises. In the end, Christie remains a true believer in the reformability of capitalism.

Needless to say, Marxism condemns such an attachment to the notion of a good capitalism on both political and philosophical grounds. However, perhaps the major objection to the Christie thesis is its utopianism. He asks us to accept a conceptual transformation in the nature of criminal conflicts as the well-spring of a New Jerusalem of criminal justice. He wants us to ignore the fact that capitalism is class-riven, and to consent to becoming proprietors of criminal conflicts. He appears to believe that the superior rationality, the benevolent morality and the logical solidity of his position are sufficient to convince that his vision should be implemented.

Christie avoids engagement with the class character of (and the class struggle which defines) our society and chooses instead to conceive of everybody as equals, at least in relation to the ownership of criminal conflicts. It is,

according to him, via the re-definition of conflicts as property that the transition to a responsive and reparative criminal justice system will be achieved. However, it is a basic Marxist postulate that all social change is rooted, ultimately, in the material conditions of class struggle. Every capitalist transformation of significance is sponsored by one of the major contending social classes, the proletariat or the bourgeoisie, in the sense that the class pledges its social power to the cause of that transformation. Christie takes a supra-class position. He appeals to all of us for the implementation of his thesis. A reliance upon the class power of the proletariat would necessarily have entailed an acceptance of the subversion and ultimate transcendence of the bourgeois worldview. That is not part of the Christie thesis. However, in the capitalist context, a general appeal which seeks to avoid class distinctions invariably becomes an appeal to the good sense of the ruling class. That is what the Christie thesis reduces to. He is offering capital a way out of a crisis which has plagued it for a considerable time now. He hopes that the bourgeoisie has the moral sensibility and political maturity to appreciate its rationality, recognize its sagacity, and implement it.

Unfortunately, Christie reckons without the class sensibilities of the bourgeoisie. As a ruling class, the bourgeoisie is concerned with notions of rationality and morality only insofar as they operate to protect and promote its class interests. A planned economy designed to meet the needs of all its citizens has long been urged, often by non-Marxists, as the most rational and moral way to organize a social formation. The bourgeoisie has consistently ignored or poured scorn upon the idea for the simple reason that it is not in concert with its fundamental interests as a class, which interests require a private economy. The Christie thesis is in more or less the same position as the idea of a planned economy: it is unimplementable within the parameters of the capitalist mode of production. And because it is unimplementable, it is utopian.

The bourgeoisie does not care for schemes which make inroads into its power and prerogatives, as Christie's would. It has no patience for plans which would have it relinquish one of its most significant power bases in the hope of not losing society further 'opportunities for norm-clarification'. The bourgeoisie supports and promotes popular capitalism because it offers a method of implicating all classes directly in the affirmation of capitalist social relations of production and in the defence of the valorization of capital. It will not do the same for restorative justice because it has little interest in creating 'pedagogical possibilities'. As the ruling class, it is concerned to prescribe norms for the dominated classes rather than to engage them in a process of 'norm-clarification'.

Christie makes the cardinal mistake of assuming that what is good for capital in the economic sphere is automatically good for it in other spheres as well. It has never been part of the agenda of the capitalist class to transform everybody into property owners. That has been the dream of the middle classes. The bourgeoisie is *the* capitalist proprietor and knows that the middle-class dream is a pipe-dream. Popular capitalism is really about increasing the property holdings of the bourgeoisie, not about making capitalist property accessible to the other classes. Privatization is really about extending bourgeois ownership of the means of production, not about sharing such ownership with the proletariat or the petite bourgeoisie. Christie believes, idealistically, that he can convince the bourgeoisie to take seriously the petite bourgeois project and create a society of property owners in relation to criminal conflicts. He supposes, hopefully, that the bourgeoisie will consent to the privatization the criminal justice system as easily and enthusiastically as it has consented to the privatization of the economy. He presumes, optimistically, that the bourgeoisie can transcend its class limitations and agree to make its justice as popular as it has sought to make capitalism itself.

Today, more than a quarter of a century after he first pronounced them, MacPherson's high hopes for capitalist property as the fundament of a revitalized and properly human democracy have come to nought. The bourgeoisie was simply not interested. The extended concept of property has been largely still-born, as capital has clung to the 'narrow' idea that property is private property. It is too early to declare Christie's thesis dead, since it enjoys much support amongst the proponents of restorative justice. However, the bourgeoisie and its state have shown little enthusiasm for it, even though it purports to hold the solution to the crisis of criminality. And it is highly unlikely that Christie's proposal to turn all criminal conflicts into forms of property will go beyond the theoretically inventive.

Property is a social relation for the appropriation of material values. Invariably, the property relation is expressed and lived juridically, as proprietary rights in the object of appropriation.<sup>54</sup> The bourgeoisie understands property in terms of entitlements to appropriate value: its ownership of the means of production confers upon it the legal right to appropriate the surplus-value produced by the proletariat. Privatization of state assets is a means of increasing such rights of appropriation. Commodification of relations traditionally outside the commodity circuit is a means of extending property as appropriation. However, the transformation of criminal conflicts into property has nothing to do with the appropriation of value. This is the basic reason why the bourgeoisie will not implement Christie's proposal, given that it also entails the expulsion of its state. Christie misunderstands what property means for capital. It enjoys so much prestige because it is the key to capital accumulation, not because it is a cure-all for social problems. Christie wants capitalist property to be what it is not or,

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54 See Suvorova & Romanov (1986: 35).

rather, what capital will not have it be. That, in the end, is the practical undoing of his theory.<sup>55</sup>

### 4.3 Braithwaite & Pettit: *Not Just Deserts*

John Braithwaite has long been acknowledged as one of the premier contemporary theorists of restorative justice. The fundamental ingredients of his theory are contained in *Not Just Deserts*, a book written with Philip Pettit, and published in 1990. Since then Braithwaite has promoted and popularized the tenets of restorative justice in a spate of journal articles and other writings. Indeed, his output of advocacy literature is prolific. However, none of these later offerings has been properly theoretical, at least not in the way that *Not Just Deserts* is. I therefore take this book as representative of Braithwaite's theoretical position, and hence as the subject of my assessment.

*Not Just Deserts* is subtitled *A Republican Theory of Criminal Justice*. It is an apt choice, for it encapsulates precisely what Braithwaite & Pettit have constructed. Firstly, like *Conflicts as Property*, *Not Just Deserts* is a theoretical work, and refreshingly so. As noted earlier, we live in an intellectual milieu which is dominated by a 'post-Marxist' antipathy to so-called grand theory and to the supposed vacuous posturings of theoretical discourse.<sup>56</sup> It is inspiring to

55 As a theory of comprehensive restorative justice (which it intends to be), Christie's is thus a practical non-starter. However, it is arguable that all partial restorative justice programmes amount to the partial implementation of Christie's thesis. In other words, it is possible to comprehend the conflicts which are resolved by these programmes in proprietary terms. Since they are mostly minor conflicts, they may be seen as forms of personal property which are not pivotal to the capitalist property regime, and thus may be readily removed to the jurisdiction of restorative justice. I am indebted to my supervisor, Professor Dirk van Zyl Smit, for this insight.

56 The anti-theory position was first elaborated in the areas of social and literary analysis. It has since emerged also in the criminological literature. See, for example, Von Hirsch & Ashworth (1992: 98 and 1993: 27-28) who include in their critique of *Not Just Deserts* the quite astonishing allegation that it is too comprehensive theoretically!

encounter a work in this climate which is overtly theoretical, and, according to the authors, comprehensively theoretical to boot.<sup>57</sup> Secondly, the theory espoused by Braithwaite & Pettit is a republican one. Republicanism is first and foremost a political philosophy, rooted in pre-Enlightenment morality and distinct from both liberalism and communitarianism.<sup>58</sup> In *Not Just Deserts*, the authors seek to develop a theory of criminal justice based four square upon the first principles of republicanism. Thirdly, the theory which Braithwaite & Pettit advance is not a theory of punishment. It is a general theory of criminal justice. The establishment of this difference is important, for as the authors note, they thereby 'open up for analysis the presumption that punishment is the pre-eminent way of dealing with crime'.<sup>59</sup>

Braithwaite & Pettit have to be commended for their efforts to comprehend the criminal justice system and to agitate for its transformation in terms of a coherent theoretical perspective. Their perspective is by no means representative of the restorative justice movement. While Braithwaite's writings are frequently cited as authority for restorationist propositions, few of his colleagues pay more than incidental attention to the theoretical perspective informing his work. Even fewer would commit to the politics of republicanism. The importance of *Not Just Deserts* is thus not to be found in any populist appeal. Rather, it deserves serious analysis because it tackles the one issue which the advocates and practitioners of restorative justice have generally avoided, namely, a theoretical justification for their claims.

A large part of *Not Just Deserts* constitutes a sustained negative critique of the fundamental postulates of retributionism and its emphasis upon the desert

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57 See Braithwaite & Pettit (1990: 12-24).

58 Pettit (1994) contains a short but useful exposition of the relationship of republicanism to liberalism and communitarianism by one of the authors of *Not Just Deserts*.

59 Braithwaite & Pettit op cit 1.

principle in punishment. From the beginning Braithwaite & Pettit are at pains to distance themselves from the retributionist resurgence which took root in criminology from the 1970s. They perceive a direct connection between retribution and political reaction.<sup>60</sup> The last two chapters of the book are devoted to demonstrating that retributionism is inferior to republicanism, both in theory and in practice. They are strident in their stance against retributionism and for consequentialism.<sup>61</sup> I shall not defend retributionism. That is best left to the retributionists themselves. Von Hirsch and Ashworth, the doyens of modern retributionism, have taken up the challenge issued by Braithwaite & Pettit, and have advanced a coherent and oftentimes potent counter-critique of *Not Just Deserts*.<sup>62</sup> My purpose at this point is not to intervene in the retributionist-republican debate. Rather, it is to evaluate the republican theory of criminal justice as a theory of restorative justice.

The theory of criminal justice proposed by Braithwaite & Pettit is founded upon a single and omnipotent concept, which they name dominion. The single and omnipresent aim of their ideal criminal justice system is to maximize dominion. They introduce their notion of dominion in the following terms:

‘Dominion is freedom, holistically conceived: not the liberal conception of freedom as the condition of the atomistic individual, but a republican conception of freedom as the freedom of the city, freedom in a social world. Dominion is constituted by the enjoyment of certain rights and by the infrastructure of capacity and power which this involves. Crucially, it has a subjective element: to enjoy dominion you must know that you enjoy all that it otherwise involves (the rights, etc) and this indeed must be a matter of common knowledge. Dominion is nothing less than the republican conception of full citizenship.’<sup>63</sup>

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60 Ibid 2.

61 They devote chapter 3 (pages 24 to 40) to an argument explaining why a theory of criminal justice should be consequentialist (as opposed to deontological).

62 See Von Hirsch & Ashworth (1992 and 1993).

63 Braithwaite & Pettit op cit 9.

This general description of dominion makes clear a number of its characteristics: it is a republican concept, not a liberal one; it is an essentially social concept, not an asocial one; it is about enjoying franchise in the company of one's fellows, not about enjoying individual freedom as a solitary condition; and it requires a citizenry conscious of the entailments and entitlements of franchise. Dominion, then, is a kind of *grundnorm* of a republican theory of criminal justice. The leitmotif of the criminal justice system should be the protection and promotion of dominion. The goal is full dominion.

Braithwaite & Pettit provide the following comprehensive three-part definition of full dominion:

‘A person enjoys full dominion, we say, if and only if:

1. she enjoys no less prospect of liberty than is available to other citizens.
2. it is common knowledge among citizens that this condition obtains, so that she and nearly everyone else knows that she enjoys the prospect mentioned, she and nearly everyone else knows that the others generally know this too, and so on.
3. she enjoys no less a prospect of liberty than the best that is compatible with the same prospect for all citizens.’<sup>64</sup>

Dominion expresses the republican ideal of citizenship or franchise. Whereas liberalism is founded upon liberty, republicanism turns upon dominion.

Dominion is the republican version of the idea of negative liberty, which is the core value of liberalism. It is about enjoying *libertas*, in the ancient Roman sense of the term, where:

‘the bearer of dominion has control in a certain area, being free from the interference of others, but has that control in virtue of the recognition of others and the protection of the law’.<sup>65</sup>

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64. Ibid 64-65.

65. Ibid 60.



In other words, republican freedom or liberty is coincident with the attributes of citizenship. Essentially, Braithwaite & Pettit comprehend the concept of dominion as a resurrection of the Roman equation of *libertas* with *civitas*.

They identify three desiderata which, they say, ‘every consequentialist theory of criminal justice, in particular every consequentialist target, ought to exemplify’.<sup>66</sup> Any candidate target of such a theory should be uncontroversial, stabilizing and satiable. They tell us that a target is uncontroversial if it ‘can be fairly naturally assigned the role of directing the criminal justice system’ in the relevant communities. They specify ‘the Western-style democracies of the modern world’ as their relevant communities.<sup>67</sup> A target is stabilizing if it is able to ‘generate a stable allocation of the rights which are uncontroversial’.<sup>68</sup> A target is not stabilizing, that is, it accommodates an unstable allocation of rights if ‘it fails to provide the criminal justice authorities with reason to take the rights seriously, attaching moral as well as legal force to them’.<sup>69</sup> Finally, a target is satiable if it motivates ‘respect for uncontroversial limits on the powers associated with the criminal justice system’ and if it does ‘not make voracious demands on the system, demands which put the limits at risk’.<sup>70</sup>

According to Braithwaite & Pettit the pursuit of full dominion is a legitimate target for the criminal justice system because it satisfies all three identified desiderata. They believe that, in ‘Western-style democracies’, dominion is an uncontroversial target of the criminal justice system. They appear to think that there can be no serious objection to a strategy aimed at minimizing

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66 Ibid 42.

67 Ibid.

68 Ibid 42-43.

69 Ibid 44.

70 Ibid 45.

the invasion of dominion which crime entails.<sup>71</sup> They contend also that the pursuit of dominion is a stabilizing target in that it is the kind of target which encourages agents of the criminal justice system to take seriously the rights allocated to people by that system. Dominion motivates criminal justice personnel to internalize respect for these rights and to assign them a deliberative significance in the decision-making process.<sup>72</sup> The promotion of dominion is also a satiable target for criminal justice: it supports the observation of determinate limits upon the scope of acceptable criminal justice practice. It does not make voracious demands which promote the breach of such limits. It rejects excesses, and upholds the principle of parsimony in punishment.<sup>73</sup>

Dominion, then, according to Braithwaite & Pettit, is a concept which encompasses all the desiderata of republican criminal justice, and hence is theoretically defensible as the target for the criminal justice systems of 'Western-style democracies'. They posit, further, that the pursuit of full dominion as the target of the criminal justice system entails 'three ordered tasks', corresponding to the elements of the definition. These are:

- creating the maximum possible equality in liberty-prospects (equality);
- ensuring the maximum possible common knowledge of such liberty-prospects (assurance);
- maximizing the available liberty-prospects for all (liberty).<sup>74</sup>

These three ordered tasks constitute the implementation agenda of full dominion as the goal of the criminal justice system. The promotion of dominion requires the maximization of levels of equality, assurance and liberty, in that order.

Presumably, full dominion will be attained with the successful implementation of the third ordered task.

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71 Ibid 69-71.

72 Ibid 71-78.

73 Ibid 78-80.

74 Ibid 68.

For Braithwaite & Pettit, the promotion of dominion requires the establishment of republican institutions via which the target will be pursued. They identify these desired institutions as formative ones, that is, institutions ‘designed to affect people in such a way that they behave as if they were primarily concerned with the public benefit, not with their own particular interests’.<sup>75</sup> In addition, such formative institutions must not be coercive but socializing. In other words, they should be institutions which base public-benefit directed behaviour not upon legal penalties but upon the construction of ‘virtuous habits of deliberation’.<sup>76</sup> The socializing formative institution promotes such habits:

‘by bringing home to people the admirable character of such deliberation, creating in them an appropriate sense of right and wrong; and by ensuring that if agents deliberate and act in a non-virtuous way, there is a good chance that they will be exposed before their peers and subjected to public disapproval’.<sup>77</sup>

Republican criminal justice requires the socializing formative institution. It is the institution which ‘affords the best protection for citizens against crime’<sup>78</sup> and which guarantees the right to a fair trial.<sup>79</sup> It is the institution necessary for creating the ‘system of mutual assurance of non-interference’ on which dominion is founded.<sup>80</sup>

Braithwaite & Pettit then turn to the question of interpreting their republican theory of criminal justice. They identify four presumptions of republican criminal justice, namely, parsimony, checking of power, reprobation and reintegration. They explain that:

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75 Ibid 81.  
 76 Ibid 82.  
 77 Ibid.  
 78 Ibid.  
 79 Ibid.  
 80 Ibid 83.

‘These presumptions serve as middle-range principles for interpreting the abstract goal endorsed by republicans: the promotion of dominion.’<sup>81</sup>

The presumption in favour of parsimony prescribes ‘less rather than more criminal justice activity’.<sup>82</sup> The presumption in favour of the checking of power requires that citizens be protected from official arbitrariness by the existence of mechanisms which provide assurance to them that they will receive fair and equal treatment under the law.<sup>83</sup> The presumption in favour of reprobation requires that the criminal justice system be so structured as to visit upon offenders the moral disapproval of the community.<sup>84</sup> The idea is that we will not commit crimes because we are ashamed of doing so. Our sense of shame is fostered by the socializing formative institution which inculcates in us, in relation to choosing criminality, ‘the deliberative habits of virtuous citizens’.<sup>85</sup> Reprobation, then, is the republican alternative to the traditional penalties. It attacks criminality not by coercion but by mobilizing social disapproval.

The final presumption, in favour of reintegration, requires that the criminal justice system make provision for community reintegration ‘for those citizens who have had their dominion invaded by crime or punishment’.<sup>86</sup> Crime undermines dominion, for both victims and offenders. Hence, according to this presumption, ‘the restoration of victims and ex-offenders to the enjoyment of full dominion must be a priority’.<sup>87</sup> However, the reintegration of the victim is more important than the reintegration of the offender.

‘The victim's dominion can be restored in a number of ways but the most effective is likely to be when the relevant community acts symbolically and tangibly to assure the victim that she is not a devalued person, that her dominion is worthy of respect.

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81 Ibid 87.  
 82 Ibid.  
 83 Ibid 87-88.  
 84 Ibid 88.  
 85 Ibid 89.  
 86 Ibid 91.  
 87 Ibid.

Symbolically, this is done by condemning the crime and the criminal - reprobation. Tangibly it is done by restitution or compensation for the victim.'<sup>88</sup>

Although secondary to the victim, the reintegration of offenders is also a prominent concern of republican criminal justice. By offending, they too have suffered a loss of dominion. They need to be shamed for what they have done. However, republicanism also considers that they need to be restored as functioning members of the community, who possess their own dominion and respect that of others.

Of the four presumptions, the first one, in favour of parsimony is, according to Braithwaite & Pettit, 'the master presumption'.<sup>89</sup> It is the one presumption which applies to the full range of criminal justice issues.<sup>90</sup> However, it is also the one presumption which is not specifically republican in character. Its 'minimalist quality' is compatible with both liberalism and libertarianism. The presumptions in favour of checking power, reprobation and reintegration are the ones which bring a 'republican stamp' to criminal justice:

'They mean that the criminal justice system favoured by republicans will place restraints on, and require accountability of, those who have power within the system; that the system will respond to convicted offenders in a way that brings home to them the community's disapproval rather than having blind recourse to the instruments of punishment; and finally that the system will seek to restore to the enjoyment of full dominion those who have been deprived of it by crime or punishment.'<sup>91</sup>

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88 Ibid 93.

89 Ibid 87.

90 Braithwaite & Pettit (ibid 12-15) identify the following ten issues as the main issues of criminal justice: behaviours to be criminalized; sentences to be permitted or enjoined; allocation of resources to and within the system; kind and intensity of permitted surveillance; cases to be targeted for investigation; cases to be selected for prosecution; making of pre-trial decisions; adjudication procedures; sentences to be imposed on the guilty; and administration of sentences.

91 Ibid 203-204.

These latter three presumptions thus exemplify the motif of the republican theory of criminal justice.

However, it is the presumption in favour of parsimony which governs the implementation of the republican theory.<sup>92</sup> The principle of parsimony is a presumption against increasing criminal justice activity. According to Braithwaite & Pettit, the implementation of the republican theory requires that there should be less, not more criminal justice intervention in our interrelations. Republican criminal justice should operate according to a strategy of decrementalism. This is a strategy based upon incremental reductions in punishments and all other aspects of the criminal justice project. There should be a progressive narrowing of the criminal justice net until such time as there is palpable evidence that the crime rate has increased, at which point the strategy should be re-assessed. They elaborate the argument thus:

‘When the first evidence is produced which justifies the belief that the accumulation of criminal justice cuts has lifted crime rates, further cutting should be stopped. There should not be a rush into reinflating the criminal justice system, but a freezing at that point to allow time for more rigorous empirical work to be done and public debate to occur. Then, guided by that research and public discussion, a decision should be made on whether increments or further decrements are called for.’<sup>93</sup>

Such is the strategy of decrementalism. It is a strategy designed to protect and promote aggregate dominion. It is practically possible, according to Braithwaite & Pettit, to narrow incrementally the net of criminal justice intervention for a considerable period without producing an increase in crime rates. The effect of the strategy can be monitored, and when the critical point is reached where decrementalism does cause a rise in crime, the strategy can be halted easily and reconsidered. Until that point is reached, decrementalism enhances dominion.

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92 Ibid 137.

93 Ibid 142.

Despite catering for it, Braithwaite & Pettit believe that the critical point at which decrementalism results in more crime will never in fact be reached. They explain:

‘We believe this because the entrenched interests in maintaining wide nets of state control are so strong that a struggle for decremental reform would never succeed in cutting the system to anywhere near the point where the dominion loss of victims from crime was sufficiently strong to outweigh the certain loss of dominion to citizens constrained in various ways by the net of state control.’<sup>94</sup>

The threat to dominion from the state will thus always be greater than the threat from crime. The strategy of decrementalism is therefore a strategy of reformism. It is the practice of republican criminal justice.

Republicanism establishes the theoretical guidelines for ‘the *Realpolitik* of exploiting opportunities for incremental reform’.<sup>95</sup> Decrementalism is the preferred strategy of implementing the republican project to promote dominion.

It remains to note that there is, in the republicanism of *Not Just Deserts*, no patent espousal of restorative justice. The authors never proclaim allegiance to the restorative justice movement. However, nobody can seriously dispute that their theory is indeed restorationist, and unmistakeably so. Certainly, Braithwaite's work since *Not Just Deserts* has focused upon defending and promoting the precepts of restorative justice. And he has subsequently equated republican justice expressly with restorative justice.<sup>96</sup> The republican theory of criminal justice is thus simultaneously a restorative theory of criminal justice.

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94 Ibid 143.

95 Ibid 154.

96 See Braithwaite & Parker (1999) and Braithwaite & Pettit (2000). See also Walgrave (2000).

This identity is confirmed by the four presumptions which Braithwaite & Pettit establish for their theory of criminal justice. The presumption in favour of parsimony, actualized in the strategy of decrementalism, coincides with the anti-statist posture of restorative justice. The progressive reduction of criminal justice activity entails reduction of state involvement in and, ultimately, its ejection from the criminal justice system. So does the presumption in favour of checking power. It implies a challenge to the conventional notion that criminal justice is necessarily state justice. The first two republican presumptions thus portend a system in which the state is not the dominant party that it currently is. The presumption in favour of reprobation mirrors the restorationist commitment to a non-punitive regime and to proper community participation in crime control. Reprobation is the restorative sanction republicanized. The presumption in favour of reintegration expresses a fundamental premise of restorative justice. It is about victim empowerment, offender reconstruction and community participation.

The republican institutions which Braithwaite & Pettit recommend would be conduits to operationalize the fraternal relations and collaborative interfacing of the restorative process. In true restorationist tradition, they are inveterate enemies of modern retributionism, and seek a solution to the contemporary problem of crime in the criminal justice practices of the ancients. Finally, their restorationism emerges most powerfully in their attitude towards state punishment. In this connection they declare that:

‘Most human action which fits criminal categories is best dealt with by refraining from invoking a punitive response. This is not to say that we think assaults, for example, should never be punished. It is to say that we need a theory of criminal justice which allows us to respond in the best way to harmful conduct, where responding in that way sometimes will, and more often will not, entail punishment.’<sup>97</sup>



Although guarded in the best academic tradition, this statement amounts to an unequivocal commitment to a non-punitive society. Their very next sentence is definitive in this regard:

‘Our aspiration, then, is for a theory of criminal justice that does not impel us to think about harmful conduct in terms of crime and punishment.’<sup>98</sup>

There is thus a complete general coincidence between restorative justice and republicanism on the question of punishment. Both want an end of it. At the start of their book Braithwaite & Pettit questioned whether punishment was the most effective response to crime. By the end one is left with no doubt that it is not, and that the non-punitive regime of restorative justice is the republican way of doing justice.

*Not Just Deserts* is as much a restorationist tract as it is a republican one. Braithwaite & Pettit are theorizing restorative justice. Their central concept of dominion and their target of full dominion articulate fully the restorationist ambition to mend the harm to victims, offenders and communities caused by criminal behaviour. The pursuit, protection and promotion of dominion are the republican route to restorative justice. In a word, then, Braithwaite & Pettit offer republicanism as the theoretical foundation and rationale of restorative justice.

#### 4.4 Critique of Braithwaite & Pettit

At the start of this assessment I welcomed the fact that Braithwaite & Pettit had produced an overtly theoretical work in an atmosphere which was heavy with an anti-theory disposition. However, approval of such theoretical engagement must not be conflated with approval of their theory. There is much to object to, from a Marxist perspective, in *Not Just Deserts*. Despite their declared devotion

to a republicanism which has pre-capitalist origins, in the end Braithwaite & Pettit do little more than construct a theoretical accommodation with capitalism.

The crucial flaw in *Not Just Deserts* is its failure to engage the issue of the socio-economic conditions in which a republican theory of criminal justice would have to be actualized. I am not suggesting that Braithwaite & Pettit are blind to the inequities which mark so many aspects of existence in each and every capitalist social formation. In Chapter Nine of *Not Just Deserts* they show themselves to be accomplished political sociologists. They present an extended and perceptive analysis of the problem of white-collar crime, and demonstrate a quite profound appreciation of the class character of and the power relations embedded in this form of criminality. They conclude with the penetrating insight that a policy of equal punishment in fact increases 'class-based inequality in punishment'.<sup>99</sup> However, these considerations do not feature as theoretical considerations for Braithwaite & Pettit. They remain conceptually peripheral, an aspect of the authors' assault upon retributionism. Material conditions are not accorded any epistemological credence and hence do not inform the theory which is constructed. In the result, Braithwaite & Pettit take a position of complete subservience to the political culture of capitalism and their republicanism emerges as one grafted onto the existing capital-labour relation.

Theirs is a capitalist republicanism. They take it for granted that the extant mode of production is the only possible one. Even though they turned to ancient Rome for their theoretical inspiration, they appear to believe that history has now ended and that the bourgeois world is the only possible world. *Not Just Deserts* was written at a time when the absurdities of Fukuyaman endism<sup>100</sup> reigned supreme as the oracle of philosophical engagement in 'the Western-style

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99 Ibid 199.

100 See Fukuyama (1992).

democracies of the modern world'. Braithwaite & Pettit appear to have been infected with the same, almost millennial belief in the final victory of the political constitution of these 'Western-style democracies of the modern world' over all-comers, especially the recently defeated Stalinist regimes of eastern Europe. As professed republicans, they may not share Fukuyama's faith in liberal democracy. But they, too, appear to believe that humankind has reached the terminus of its History.

Thus, in explaining why white-collar criminals are treated more leniently than their blue-collar counterparts they tell us that there are so many of these upper-class criminals that any attempt to prosecute 'even the tiniest proportions of them would bankrupt the wealthiest governments in the world'; and that white-collar crime is so complex that investigators are 'led to drop the case in exasperation, and return to the less frustrating work of punishing small-fry.'<sup>101</sup> Number and complexity are supplemented by the inexorabilities of class power:

'While there are important differences of degree, there is almost a sociological inevitability that ruling-class constituencies will mobilize their political and economic power so that enforcement directed against them will be more muted than that which the police deliver against the working class.'<sup>102</sup>

Earlier they had declared, in similar vein, that it is 'a sociological inevitability that most of those in our prisons will have blue collars or black faces'.<sup>103</sup> These last two statements amount to a submission that the social relations of production of the capitalist mode of production are themselves 'a sociological inevitability'. Braithwaite & Pettit are in effect asserting that the capital-labour relation is ineluctable and hence that the bourgeois social organization and all its accoutrements are inescapable. There is no other way but the capitalist way.

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101 Braithwaite & Pettit op cit 190.

102 Ibid 191.

103 Ibid 183-184.

There is thus a discernible positivist epistemological tenor to the republican theory which they advocate.<sup>104</sup> They accept the existence and reproduction of the capitalist mode of production as if it were a natural phenomenon.<sup>105</sup> They reify capitalist social relations of production and endow them with an existence and power beyond the reach of human beings.<sup>106</sup> Political activity is reduced to the stratagems of a *realpolitik* which accords an apriority to extant social organization and makes short shrift of its historicity. They genuflect before the supposedly inescapable actuality of bourgeois class rule and give no credence to the role of social and political practice in both the formation and the destruction of class society. For them, the nature of society is pre-determined, according to rules which do not rely upon or require human intervention. Such intervention is limited to taking what opportunities do or may arise to promote the republican ideal of dominion.

Their condonation of the structure of capitalist exploitation and oppression is expressed in their argument that it is acceptable that white-collar criminals receive mercy. They believe that it is in the interests of society as a whole that we do not attempt to prosecute each and every such criminal. Thus they state:

‘The hard fact of life is that white-collar offenders often have some things of real value to offer the community in exchange for legal immunity. It is a sad reality of power that cannot be wished away by pious sloganeering about justice. The most regular occurrence of this sort occurs with financial institutions deserving of criminal prosecution, where regulators are reluctant to prosecute for fear of causing a run on the institution, ruining small investors who are slow to get their money out.’<sup>107</sup>

They conclude by pronouncing that:

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104 See Hughes (1990: 16-23) for a useful discussion of the meaning and elements of positivism. See also Kolakowski (1972: 9-19).

105 See Wilson (1983: 8).

106 See Fay (1975: 58-9).

107 Braithwaite & Pettit op cit 194.

‘the reality of enforcing the law against business violations which are vast in number, complex in nature, and formidably defended, is that there is no society, and never will be a society, that can allow the dispensation of deserved punishments to be the principle which guides efforts to secure business compliance with the law.’<sup>108</sup>

The remarkable thing about these statements, besides the resolute repetition of the sociological inexorability of capitalist culture, is the resolute exclusion of the working class and its contribution to the production of social wealth. Braithwaite & Pettit do not comprehend the first principle of political economy, namely, that it is the labour-power of the proletariat that is the real source of ‘real value’ in the capitalist mode of production. It is the proletariat, not the bourgeoisie, that creates value. It is the unpaid labour of the workers that is expropriated by the capitalists as surplus-value. When Braithwaite & Pettit plead the case of white-collar criminals because they ‘often have some things of real value to offer the community’ they display a disconcerting ignorance of the nature of the capital-labour relation and hence of the true role of each of its components in the reproduction of that relation.

If any class of criminals should be entitled to legal immunity it is the blue-collar criminals, for it is they who have so much ‘real value to offer the community’. It is an aspect of the class mythology of capital that the bourgeoisie is *the* productive class: it is portrayed as the class which invests in the economy, generates employment for workers, and is responsible for the creation of wealth. This same mythology would have us believe that white-collar criminals have ‘real value to offer the community’. Certainly, Braithwaite & Pettit set great store by the ‘value’ of the members of the upper-classes. They are, according to these authors, such valuable social assets that they deserve to be treated with leniency when they break the law. Here Braithwaite & Pettit concur fully with capital's

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108 Ibid 196.

claim that its sectional interest coincide with the general social interest. Such is the power of bourgeois ideology.

In Marxist terms, the dominant classes are parasitic upon the value produced by the proletariat. White-collar criminality is an expression of the material realities of the capital-labour relation. The dominant classes have nothing to offer the community other than an enthusiastic, and oftentimes violent, commitment to the reproduction of that relation. The legal immunity which Braithwaite & Pettit believe white-collar criminals deserve is an immunity which they are able to arrogate for themselves by virtue of their class power and their concomitant access to state power. The popular belief that the rich and powerful are above the law has its origin in the 'hard fact of life' that they constitute the class which controls the state and whose interests the state exists to guarantee. Immunity or leniency for white-collar criminals is 'a sociological inevitability' within the parameters of a society structured by the capital-labour relation. The notion that 'there is no society, and never will be a society' able to deal with white-collar criminality by 'the dispensation of deserved punishments' is valid only if 'society' is qualified by the epithet 'capitalist'. It is capitalist society that is unable and unwilling to confront and condemn white-collar criminality in the way it does blue-collar criminality.

There is a world of difference between explaining why white-collar criminals are treated leniently and proposing that they should be treated leniently. The former deals with what is, the latter with what ought to be. Braithwaite & Pettit resort to the idea of sociological inevitability to explain the impunity of white-collar criminality. They then proceed to argue that such impunity is deserved, on the basis of the social 'value' of upper-class criminals. This is a leap which defies even the laws of formal logic. It is a *non sequitur*, a sort of syllogistic fallacy. They seek to make a virtue of the accomplished fact. They tell

us, in effect, that because they do get mercy, therefore most white-collar criminals ought to get mercy. They offer the same mercy to blue-collar criminals as a means of reducing class-based inequality in punishment.<sup>109</sup>

This is a quite astonishing position. It is premised upon an acceptance of the perceived permanence of what is. It denies development and change. It takes the existing social relations of production as the only possible array of such relations. History, they seem to be saying, reached its destination with the rise and triumph of the capitalist system. Capitalism is the end of the line. It is an inescapable reality, to which theory must adapt. Theory must stay within the bounds of bourgeois possibility. Braithwaite & Pettit evince an almost fawning obeisance to the hard realities of class oppression and exploitation. Whereas Christie ascribed a transformative role to his theory of criminal justice, Braithwaite & Pettit espouse a *realpolitik* of acquiescence in and accommodation to the facticity of capitalist relations. The very concept of decrementalism, which constitutes the strategic pivot of their project, entails a denial and rejection of the possibility of a post-capitalist world.

Braithwaite & Pettit's rapprochement with capitalism and their assent to the naturalness of its culture, including its culture of white-collar criminality, is extremely problematic for the republicanism which they advocate. Their philosophical positivism and political endism coalesce in a major, arguably fatal, methodological error: they theorize republican ideals from capitalist postulates. Capitalism is intrinsically and definitionally anti-republican (despite the fact that very many capitalist social formations are formally republics). In this regard, it needs to be recalled that republicanism is not merely a pre-liberal political philosophy; it is also a pre-capitalist political philosophy. It derives from a

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109 Ibid 200.

historical era which precedes the rise of individualism as the defining characteristic of capitalist political culture. And it is infused with a sociality which runs counter to the fundamental atomist tenets of the bourgeois worldview. There is a very good reason why republicanism is not the bourgeois political philosophy of choice, and that is because it is organized around a concept of the social being which is anathema to the needs and demands of the capitalist mode of production. Capitalism is inherently anti-republican because republicanism is genetically pre-capitalist and constitutionally anti-capitalist.

It is liberalism which is the representative political philosophy of capitalism. Liberal ideas suffuse capitalist culture and morality. The 'Western-style democracies of the modern world' which Braithwaite & Pettit identify as their target communities are communities which have been constructed upon the principles and values of liberalism.<sup>110</sup> There is, as Braithwaite & Pettit themselves make abundantly clear, a fundamental discordance between liberalism and republicanism regarding the constitution of the person and her relationship to the body politic.<sup>111</sup> This discordance summates in what they refer to as 'the asocial-social distinction'.<sup>112</sup> Liberalism occupies the first element of the distinction, republicanism the second. They have only one point of overlap: in the concept of negative liberty or freedom. Otherwise, they are philosophical and theoretical contraries, which envision societies which are radically divergent in the nature of their social relations.

The capitalist social formations which constitute the 'Western-style democracies' are liberal (of late, neoliberal) democracies. Their state structures

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110 Ramsay (1997) contains a readable presentation and critique of the main tenets of liberalism.

111 See Braithwaite & Pettit op cit 54-61 for a discussion of the elementary ontological and epistemological differences between liberalism and republicanism.

112 Ibid 56.



have been erected upon liberal fundamentals. They have embraced the core tenets of liberalism as the governing principles of their social matrices. The atomistic individual enjoys ontological primacy and constitutes the elemental cell of sociological analysis. Social relations are theorized and lived as individual relations, in which conceptions of solidarity and collective citizenship have no natural or necessary role. There is a fit between capitalism and liberalism which is rooted in the deep structure of the mode of production and its superstructural concomitants. This collaboration is, for the most part, exclusive. There is no room for interlopers, except when a capitalist crisis demands a non-liberal solution.<sup>113</sup> Republicanism is such an interloper. Its emphasis upon social personhood and virtuous citizenship does not accord with the exigencies of capitalist social relations of production.

The liberal bias of capitalism entails an anti-republicanism. The recent shift to neoliberalism in the 'Western-style democracies' has exacerbated the antagonism. In its pursuit of economic growth via the global market, neoliberalism is more staunchly anti-social than classical liberalism. Politically, it represents a move to the right, expressed in fiscal austerity, privatization programmes and the dismantling of the welfare state. We are told, day in and day out, to make our way and our fortunes as unencumbered and enterprising individuals in the globalized arena of the free market. If liberalism is intrinsically anti-republican, neoliberalism multiplies the antithesis manifold. There is, in a word, no room in the political firmament of contemporary capitalism for republicanism. The sociality and solidarity which define the latter hold and can hold no attraction for the neoliberal champions of the former.

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113 Within the parameters of capitalism, such a solution routinely is expressed in political terms as a lurch to the right, towards neoliberalism, authoritarianism and sometimes as far as fascism.

Braithwaite & Pettit do not comprehend this very basic reality and its implications for their theory of criminal justice. They do not appreciate that their commitment to the continued existence of the 'Western-style democracies' must needs undermine definitively the opportunities for their republican strategy to take root. It is true that they foresee nothing more than incremental reform towards a republican system of criminal justice. However, even this modest programme, as they themselves concede, has but a slim chance of success within the parameters of the capitalist system. The current criminal justice system is a product of the liberalism which is the philosophical font of the bourgeois worldview. The police, courts, prisons and other criminal justice agencies as we know them are the products of a liberal conception of criminality and victimhood. That conception insists that both the perpetrator and the victim of crime are first and foremost autonomous individuals. The former has gone beyond the permissible bounds of individual autonomy; the latter has suffered a corresponding invasion of his autonomy.

Liberal capitalist criminal justice is centrally concerned with punishing the offender who has violated the credo of individualist autonomy. The victim has only of late been accorded a measure of attention, after being sidelined for decades. The reasons for this development have been discussed in Chapter Two. However, the emergence of victimology has not signalled any major shift in the focus of the criminal justice system. It remains dedicated to disciplining offenders, for it is they who, by their excesses, threaten the stability of the liberal concord. The preferred agent of punishment remains the state. And the preferred method of punishment remains imprisonment or the threat thereof. This configuration of liberal criminal justice is derived from capitalism's formal commitment to equality in all exchange relationships, including the exchange between offender and victim.<sup>114</sup>

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<sup>114</sup> See Chapter Five below.

Republican criminal justice, as theorized by Braithwaite & Pettit, is dedicated to the promotion of dominion or, more accurately, the protection of dominion from invasion by criminal justice agencies. Dominion is essentially a social concept and is intended to be a social condition. It is achieved in concert, by a society whose members have been socialized into a deliberative posture towards their own and others' freedom. As intimated earlier, republican dominion shares with liberal autonomy only the idea of negative liberty. They are antitheses in all other respects. This means that, in a bourgeois world structured by a juridical outlook which is liberal, there is no latitude for and there can be no indulgence of a jurisprudence which is properly republican. The domination of liberal autonomy entails the expulsion of republican dominion.

In this connection, Braithwaite & Pettit's claim that the pursuit of dominion as a target of the criminal justice system is uncontroversial, stabilizing and satiable calls for comment. In a liberal context, any strategy which undermines the core value of individual autonomy is decidedly controversial. The promotion of dominion is predicated upon a social notion of personhood, and hence cannot, as they would have it, 'be fairly naturally assigned the role of directing the criminal justice system' in a capitalist social formation predicated upon the liberal worldview. The discrete elements of dominion may not appear to be especially controversial. But as a concept it embodies, for the most part, the converse of the liberal idea of freedom. It is hard to see how the bourgeoisie can or will accede to dominion replacing autonomy, albeit gradually, as the primary target of its regulatory project. It is thus not a foregone conclusion that the promotion of dominion is an uncontroversial target for the criminal justice system.

Much the same applies to the claim that the promotion of dominion is a stabilizing target. It will be recalled that Braithwaite & Pettit hold that a target is stabilizing if it motivates criminal justice agents to internalize a commitment to

taking people's rights seriously. In practice this means that criminal justice authorities do not arbitrarily trample on people's criminal justice rights. In other words, the target of dominion is circumscribed by legal restraints to protect the citizen from unfair and illegal state action. According to Braithwaite & Pettit, taking the promotion of dominion seriously must necessarily mean taking the protection of rights seriously.<sup>115</sup> That is an attractive proposition. But it is also problematic. For it implies that the stabilizing quality of dominion as a target is dependent upon the commitment of criminal justice personnel. In other words, there is nothing intrinsic in the composition of dominion which makes it a stabilizing target. It all depends on the co-operation of the police, prosecutors, judges, prison officials and the like. Essentially, the stabilizing nature of dominion requires that criminal justice agents all be convinced republicans.

This is unrealistic and idealistic. We live in a world dominated by the liberal perspective and its neoliberal transmutation. However, few analysts would claim seriously that our criminal justice authorities are all, or even in the main, committed liberals. There is an objective reason for this. Criminal justice personnel are agents of the state. They function on the borderline of the violence which is the legal monopoly of the state. Often, at least some of them invoke or have to invoke their right to deploy the force which they may have at their disposal. A milieu of violence is not conducive to the growth of the rights-respecting aspect of dominion. Those who accept and subscribe to the liberal outlook do so despite the structural pressures towards reaction. Republicanism is politically to the left of liberalism, if only in its focus upon the social conditions of existence. It is, in this regard, difficult to avoid the conclusion that there is but little scope for republicanism to become the chosen political philosophy of criminal justice agents. There is thus little chance of the promotion of dominion even becoming their target, let alone being a stabilizing one.

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115 See Braithwaite & Pettit *op cit* 73 & 76.

The final target identified by Braithwaite & Pettit is satiability. They claim that the promotion of dominion is a satiable target for the criminal justice system, in the sense that it does not encroach upon the limits of a rights-based criminal justice practice. Here, again, the nature of the state is important. The capitalist state is the final guarantor of the existence of the capitalist mode of production, and violence is its ultimate means of performing this function. The capitalist state is a totalizing institution of coercion. As a pivotal facet of the state, the criminal justice system is always immanently insatiable. It may be possible to set a satiable target for the criminal justice system. However, the system itself cannot tolerate such a target, except in a contingent sense. It is structurally voracious and will threaten always to violate the limits of any satiable target. The nature of the political under capitalism thus gives the lie to the possibility that republican dominion can be a satiable target for the criminal justice system. Capitalist criminal justice is insatiable in principle and cannot accommodate a satiable target. It therefore cannot accommodate dominion.

It remains to cast a critical eye upon the concept of dominion itself. Here my argument is that dominion, as defined by Braithwaite & Pettit, entails a proprietary postulate, not unlike Christie's proprietary notion of criminal conflicts. Braithwaite & Pettit do not themselves make any express connection between their theory and Christie's. It is submitted, however, that such a connection does exist, theoretically at least. It is plausible to conceive of dominion as a form of property in the same way as Christie has done for conflicts. Etymologically, dominion is derived from the Latin *dominium*, which translates variously as 'power' or 'ownership' or 'lordship' and as 'property' or 'absolute property'. Needless to say, etymological commonality is no guarantee of conceptual commonality. However, it is remarkable that Braithwaite & Pettit should have chosen to give their central concept a name which is, notionally at least, property

based. It is submitted that this terminological choice is not entirely coincidental. The proprietary lineage is to be detected in the nature of dominion itself.

According to Braithwaite & Pettit dominion is very different from (and much more than) the right to negative liberty or non-interference. Thus, they state that:

‘Dominion, freedom in the republican sense, requires more than the bare fact of exemption from interference by others; more than the liberal notion of freedom. Although it starts from a negative rather than a positive definition of freedom, it requires equal liberty-prospects with others and the knowledge shared with others of having those prospects; it has a social and a subjective side.’<sup>116</sup>

I want to suggest that the difference between negative liberty and dominion is of a proprietary sort. The concept of dominion which Braithwaite & Pettit describe resonates with a sense of ownership: having dominion entails a consciousness of having a valuable entitlement, which gives one standing and protection.<sup>117</sup> It is a prized asset bringing to its holder the assurance that he enjoys a demarcated domain of inviolability. In this connection there is a patent coincidence between dominion and capitalist property. Both engender or are supposed to engender feelings of security and safety against the intrusions of a prehensile state. Like proprietary rights, dominion is, in principle at least, ‘valid against the whole world’.<sup>118</sup> It is not contingent. It is, like property, a comprehensive relation which structures one's social interactions and political access. X has dominion in the same sense as she owns property: she has a valid expectation that her fellow citizens will respect her entitlement; and that it will be legally enforceable in the case of interference.

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116 Ibid 203.

117 Ibid 64.

118 Olivier *et al* (1992: 23-24). See also Schoeman (1983: 38). Van der Merwe (1987: 37, original emphasis) says that: ‘The fact that A is the owner of a house implies that *all* other persons should respect his rights with regard to his house.’

Christie would have us transformed into a society of property owners. Braithwaite & Pettit would have us transformed into a society of dominion holders. There is a discernible analogue between Christie's proprietary conflicts and Braithwaite & Pettit's republican dominion. They themselves note a correspondence between 'the invisible hand of the market institution', to which republicans have no principled objection, and 'the intangible hand of formative institutions', about which republicans are positively enthusiastic.<sup>119</sup> The formative institution is, according to Braithwaite & Pettit, the type of institution required for the promotion of dominion or freedom of the city. It is notorious that the market institution is the emblematic expression of the freedom of property. Both market and formative institutions are, for Braithwaite & Pettit, vehicles of freedom. The modes of freedom are, respectively, property and dominion. It is suggested that the latter may legitimately be comprehended as a species of the former.

It will be recalled that Christie's construction of conflicts as property relied upon an unconventional form of capitalist property, namely, common property. It is submitted that dominion, too, may be understood as a category of common capitalist property. It is a form which emerges from the formative institutions envisaged by Braithwaite & Pettit. Whereas market institutions promote private self-interest, formative institutions support public mindedness and the common weal.<sup>120</sup> Dominion is the common property associated with the socializing formative institution. It is a social relation which is shared by all but to which each has rights of enjoyment, security and protection, as an individual.

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119 Braithwaite & Pettit op cit 82.

120 Ibid 81.

Needless to say, Braithwaite & Pettit have not embraced expressly MacPherson's expanded notion of capitalist property. However, the republicanism which they espouse is a capitalist republicanism. It proceeds from the capitalist mode of production as a given. What is, therefore, being suggested is that their theoretical pivot, dominion, is imbued with the spirit of property, the ideological premise of capitalism. The republican freedom which Braithwaite & Pettit propose can be reconciled without too much difficulty to the wide concept of property as the right to a fully human set of social relations. Freedom of the city is, in the capitalist context, consonant with the MacPhersonian notion of proprietary rights as the foundation of real democracy. Dominion is property republicanized. It is the citizen's key to and guarantee of a virtuous life. It is the road to membership of the true republic.

The above argument may appear speculative and controversial. It is, however, defensible in terms of Braithwaite & Pettit's elaboration of dominion, and its maximization, as the prime target of republican criminal justice. In this regard, they tell us that:

‘dominion is the social status you perfectly enjoy when you have no less prospect of liberty than anyone else in your society and when it is common knowledge that this is so.’<sup>121</sup>

Their classification of dominion as a social status is important. It is not a right or a benefit or a reward. It is more than that: it is a social status. That is, it is a complex of class, cultural and other relations which defines one's quality of life and life chances. In the capitalist world there is one relation which is indispensable to the proper comprehension and fundamental to the scientific analysis of any social status, and it is the property relation. Bourgeois morality prescribes that everything we are or can be is dependent, in the final analysis,

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121 Ibid 85.



upon our proprietary endowments. We each of us take our place in the bourgeois scheme of things first and foremost as men or women of property. It is in this connection that dominion, as a social status in the capitalist world, has to be theorized in proprietary terms.

Macpherson was right about one thing: that in every capitalist social formation 'property has more prestige than almost anything else'.<sup>122</sup> Christie's theorization of conflicts as property evinces a clear appreciation of this ideological fact. Braithwaite & Pettit's republicanism also takes cognizance of this fact, if somewhat obliquely. Their analysis of and approach to white-collar crime are based squarely, albeit not expressly, upon the superior social weight accorded those who own and control that most valuable of all capitalist property, the means of production. Their attempt to construct a rapprochement between white-collar crime and the pursuit of dominion is a reliable index that they, like MacPherson and Christie, appreciate the power wielded by property in the ideological constitution of the capitalist mode of production.

The etymology of Braithwaite & Pettit's central concept is thus important and, it is contended, not accidental. They turned to republican Rome in their search for a virtuous citizenship. They brought back not only *libertas* and *civitas*, but also *dominium*. The republican Roman idea of citizenship was one intimately connected with property. Slaves were not citizens; they were a species of property themselves. Plebeians were citizens; but they were, for the most part, not or meagrely propertied and their citizenship was thereby reduced to a second-class one. It was only the propertied patricians for whom *civitas* was properly coterminous with *libertas*. Political power in republican Rome belonged to the landowning nobility.<sup>123</sup> Property was the route to the republican franchise as

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<sup>122</sup> MacPherson op cit 138.

<sup>123</sup> See Chapter Two above.

understood by Braithwaite & Pettit. Republican Roman history is littered with the struggles of plebeians and the revolts of slaves against the social and political dominance of the patricians and their monopoly of the freedom which was supposed to be a generalized attribute of citizenship.<sup>124</sup> The *civis Romanus* was a man of property, a man who enjoyed *dominium*, 'the ultimate legal title beyond and above which there was no other'.<sup>125</sup>

The historical vector of Braithwaite & Pettit's dominion goes back not only to the Roman *civitas*. Its trajectory also encompasses the Roman *dominium*, which was 'the most extensive right to property that Roman law conferred'.<sup>126</sup> In other words, contemporary republican dominion is derived from the ensemble of Roman republican social relations, in terms of which citizenship was denied to those who were property and entailed substantive freedom, in the sense of freedom of the city, only for those who were abundantly propertied. The vast majority of the Roman population did not have dominion because they did not have *dominium*.

Braithwaite & Pettit would, by definitional fiat, endow us with the *dominium* which the Roman masses lacked, and hence the *libertas* which they count as the proper target of their theory. Their concept of dominion is, in this regard, deeply proprietary in nature. They make the following statement of summation of their core concept:

'We hope that the term [dominion] has the connotations required to suggest that the bearer of dominion has control in a certain area, being free from the interference of others, but has that control in virtue of the recognition of others and the protection of the law.'<sup>127</sup>

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124 See Novack (1979: 34-37) and Manfred (1974: 90-111).

125 Thomas (1981: 134).

126 Spiller (1986: 101).

127 Braithwaite & Pettit op cit 60.

This is a proprietary formulation: from control and non-interference to publicity and legal protection. It is as if Braithwaite & Pettit are attempting to confer upon the populace of 'the Western-style democracies of the modern world' the property required to enjoy republican freedom. They appear to be accepting that the link between capitalist citizenship and republican freedom needs to be a proprietary one, and that dominion is such a link.

Over and above the etymological and the historical, the connection between dominion and *dominium* is thus also a theoretical one, in the sense that dominion is constructed in terms which are identifiably proprietary. In Roman law:

'The most comprehensive right which anyone could have in respect of a thing was certainly the right of ownership, a right which even today forms the basis of all capitalistic legal systems.'<sup>128</sup>

Braithwaite & Pettit, it is submitted, have incorporated this proprietary texture of capitalist law directly into their construction of dominion. The republican theory of criminal justice elaborated by them turns on a concept which exemplifies the expansive form of property championed by MacPherson as the route to real democracy and adopted by Christie as the panacea for the crisis besetting contemporary criminal justice. They are proposing that the crisis of criminal justice will be solved if we all become bearers of dominion. I am proposing that dominion is a form of property and hence that Braithwaite & Pettit, like Christie, have formulated a proprietary solution to the crisis of criminal justice. The only significant difference is that whereas Christie believes that all of us already have a proprietary stake in the criminal justice system, Braithwaite & Pettit believe that it should be the target of the system to provide us with such a stake.

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128 Van Zyl (1983: 132).

The arguments comprising my critique of the Christie thesis apply, *mutatis mutandis*, to Braithwaite & Pettit insofar as dominion is comprehended as a form of property. It is submitted, further, that the bourgeoisie has even less interest in Braithwaite & Pettit's republicanism than in Christie's petit bourgeois radicality. For, whereas the latter wants no more than to extend the operation of the core liberal value of freedom of property to the criminal justice system, the former seeks to reconstruct that system according to an overtly anti-liberal prescription.

It is true that Braithwaite & Pettit attempt to tone down the implications of their theory by opting for a 'strategy of incremental implementation' attuned to *Realpsychologie* and *Realpolitik*.<sup>129</sup> It is, however, also true that the bourgeoisie is singularly attuned to the protection and promotion of its own interests and will not to be taken in by incrementalism which aims, by stealth, to replace its criminal justice system. The capitalist rulers will, in a word, not allow republican incrementalism to be implemented. It will be stillborn as a strategy because republicanism is unacceptable to the bourgeoisie as a principle of social organization.

Capitalism is synonymous with the catechism of individualism. In the liberal bourgeois scheme of things, and even more so in the neoliberal version thereof, the individual precedes the community always. Republicanism seeks to reverse or, at least, to restructure this most fundamental of bourgeois presumptions. Braithwaite & Pettit believe it can be done unobtrusively. They underestimate seriously the astuteness of the bourgeoisie when it comes to spotting and despatching schemes subversive of its worldview. It matters nothing that Braithwaite & Pettit entertain no ambition whatsoever of transcending the parameters of capitalist social relations of production. It matters nothing that they proceed from these relations as given. Objectively their republican aspirations

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129 Braithwaite & Pettit op cit 204.

stand opposed to the ideological universe of capitalism and threaten to undermine its coherence. It is a foregone conclusion that the bourgeoisie will not countenance the creeping republicanism which Braithwaite & Pettit advocate. In the end the republican theory of criminal justice is mired in a utopianism not unlike Christie's. Braithwaite & Pettit believe that their theory is comprehensive<sup>130</sup> and practical,<sup>131</sup> and hence that it ought to be implemented. They perceive no insuperable obstacle to the construction of a republican criminal justice system according to the precepts of their republican criminal justice theory. They believe that the *realpolitik* of gradualism will overcome or, at least, neutralize whatever political opposition an implementation programme might encounter. However, the reality of political power in the capitalist world makes nonsense of this faith and renders a republican criminal justice a non-starter within the parameters of capitalism.

This much would have been patent had their theory been properly comprehensive. They claim that theirs is:

‘a comprehensive theory of criminal justice, not just a theory of punishment or a theory of police powers or a theory of prosecutorial discretion.’<sup>132</sup>

They eschew sub-system theories and opt for a general theory of the whole system.<sup>133</sup> However, their theory is not general enough. Despite the allegation by Ashworth & Von Hirsch of over-comprehensiveness, from the Marxist perspective the theory contained in *Not Just Deserts* is not comprehensive enough. It is a sociological truism that the problem of criminal justice cannot be comprehended fully in terms of a theory of criminal justice *per se*, no matter how general or systemic or comprehensive or coherent in relation to criminal justice

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130 Ibid 12-24.

131 Ibid 204.

132 Ibid 7.

133 Ibid 8.

such a theory purports to be. The problem of criminal justice is a product of and implicated in the extant social relations of production. A properly comprehensive theory of criminal justice should at least begin by situating the criminal justice system in its socio-economic context.

Throughout *Not Just Deserts* the authors demonstrate often quite profound insights into the power configuration and class composition of contemporary capitalist society. However, these insights are never comprehended theoretically and hence are not incorporated into the theory which they generate. Politics and the state exist on the periphery of their theory, as practicalities to be negotiated and not as relations for analytical engagement. Braithwaite & Pettit have chosen to locate the theory at a fairly low level of abstraction, namely, that of the criminal justice system. It is comprehensive at this level. However, republicanism is first and foremost a political and social philosophy. On the first page of the book they themselves classify 'dominion as a political goal'.<sup>134</sup> Dominion is concerned with the way society is structured and organized, and with the quality of the relations amongst the citizenry. It makes no sense to formulate a republican theory of criminal justice which does not comprehend such a criminal justice as an aspect of a society organized according to republican principles. In other words, a properly comprehensive republican theory of criminal justice needs to be located at a level of abstraction which is high enough to include the relationship between the criminal justice system and the social system.

Braithwaite & Pettit have not attempted to be comprehensive in this sense. They apparently consider that it is analytically legitimate to separate the pursuit of republican criminal justice from the vision of a republican society. One suspects that it is a methodological choice informed by the spirit of the same *realpolitik* which they identify as the implementation context of their theory. It is a choice

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134 Ibid vii.

which is informed by the positivism which colours so much of *Not Just Deserts*. For them capitalism is an ontological datum, and hence it does not feature as an epistemological issue in the production of their theory. From a Marxist perspective, this procedure is, of course, invalid.

Criminal justice is a superstructural effectivity. The Marxist method of social analysis requires that it be apprehended in its relation to the material conditions of its existence. Primarily this entails an effort to comprehend the nature of the relationship between republicanism and capitalism and to grasp the meaning of and potential for republican criminal justice in a capitalist milieu. This methodological imperative prescribes that the construction of a theory of criminal justice should, at least, commence at a high level of abstraction, namely, the level of the mode of production. The specificities of the theory can thereafter be elaborated at a lower level of abstraction, that of the criminal justice system.

Braithwaite & Pettit have, *ab initio*, severed the criminal justice system from the social system. The result is that they find themselves in the curious position of advocating the establishment of a republican system of criminal justice in a society which is structurally anti-republican. This curiosity means that their theory is not practical, as they proclaim it to be. Implementation, even the gradual and piece-meal implementation proposed by them, requires the co-operation of the state and the assent capital. However, there is nothing in the political culture of either to suggest that they will allow a republican criminal justice to take root. That political culture has in recent times shifted right from liberalism to neoliberalism, under pressure of the enduring and deepening structural crisis of capital accumulation and profitability. Neoliberalism, with its penchant for welfare cutbacks and privatization, is even more incompatible with republicanism than liberalism. There is no room for a republican criminal justice system in this epoch of decadent capitalism. Like Christie's, Braithwaite & Pettit's theory is

unimplementable within the parameters of the capitalist mode of production. Von Hirsch & Ashworth are correct when, in their critique of *Not Just Deserts*, they conclude that its project is utopian.<sup>135</sup>

#### 4.5 Cragg: *The Practice of Punishment*

Wesley Cragg's *The Practice of Punishment: Towards a Theory of Restorative Justice* completes the trilogy of theoretical works which constitutes the subject matter of this chapter. Cragg's offering is akin to Christie's and Braithwaite & Pettit's in that it, too, is an exercise in sustained theorizing about restorative justice. However, it is also very different from the other two in that it never ventures analytically beyond the bounds of the existing criminal justice system.

Christie advocates, radically, the complete eviction of the state from criminal justice matters. Braithwaite & Pettit are somewhat more circumspect and settle for a creeping republicanism. However, they also anticipate the eventual replacement of state punishment. Cragg is, comparatively, the most conservative. He takes state punishment as a necessary given. His theoretical agenda is to make over state punishment along restorationist lines. In the result, he produces a theory of restorative justice which is simultaneously an effort to rescue and reinvigorate criminal justice. Whereas the theories of Christie and Braithwaite & Pettit may be classified as theories of comprehensive restorative justice, Cragg's is a theory of partial restorative justice.

Already in the preface, Cragg makes evident the position which he will adopt, develop and defend throughout *The Practice of Punishment*. Thus, he declares:

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135 Von Hirsch & Ashworth (1992: 97 and 1993: 27).



‘The function of law, I argue, is to reduce justified recourse to violence in the resolution of disputes. Understanding the implications of this for coercing compliance with the law allows the construction of a theory of punishment built on principles common to policing, adjudication, sentencing, and corrections, an account, furthermore, that is able to capture the strengths of the traditional theories of punishment while avoiding their defects.’<sup>136</sup>

Like Braithwaite & Pettit, Cragg seeks to articulate a comprehensive theory, not of punishment, but of law enforcement as a system, of which punishment or, more correctly, sentencing is one aspect.<sup>137</sup> However, unlike Christie, he eschews abolitionism. He separates himself from Christie very early on by rejecting the ‘radical’ notion that ‘punishment should in principle be abolished and replaced with a humane alternative’ as ‘thoroughly impractical or utopian’.<sup>138</sup> He avers that ‘punishment could be said to be a natural feature of human existence’<sup>139</sup> and is categorical in his submission that state punishment is ‘an unavoidable feature of the criminal law’.<sup>140</sup>

Cragg's aim, then, is not to replace but to reform the penal practices of ‘contemporary western European and North American societies’.<sup>141</sup> He is concerned to develop a theory of such a reformed practice of punishment. And his preferred methodology is to import into his theoretical endeavour some of the commonsense, everyday insights which we have apparently developed about such penal practices and which we have apparently integrated into our belief system. Thus he states:

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136 Cragg (1992: ix-x).

137 The other two are policing and adjudication.

138 Cragg *op cit* 2.

139 *Ibid* 10.

140 *Ibid* 8.

141 *Ibid* 3.

'I shall argue that reforming penal institutions and correctional practices can only succeed where widely held informal understandings and formal patterns of punishment are brought into harmony with each other.'<sup>142</sup>

Cragg wants to avoid the supposed pitfalls of 'abstract theorizing'.<sup>143</sup> He seeks, instead, to solve the problem of punishment via 'a dialogue between theory and practice'.<sup>144</sup> That dialogue depends upon a marriage between the formal and the informal, between philosophy and common-sense. The current practice of state punishment needs to be commixed with our 'everyday accounts of punishment'.<sup>145</sup> The former requires 'significant reforms';<sup>146</sup> the latter provides a legitimate foundation for constructing a reformed practice.

For Cragg, the primary outcome of the interaction between the formal and the informal is the necessity of punishment. As already noted, he refers to punishment as 'an unavoidable feature of the criminal law'. This assertion is in fact the founding tenet of the theory of restorative justice which he goes on to develop. It must be noted that when he refers to punishment he means state punishment, operating through the formal institutions of the official criminal justice system. The inevitability of punishment in this sense is entailed, for Cragg, in the origin and nature of law itself. He states his position in the following terms:

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142 Ibid 2. These 'informal understandings' are, according to Cragg (ibid 6-7), expressed in four 'deeply held beliefs about punishment'. They are that:

- 'Something like punishment as we understand it is an unavoidable element of modern social life.'
- 'The practice of punishment, reflecting as it does the evolution of our criminal justice system and the kind of penalties it typically imposes for criminal acts, from imprisonment to fines, is in principle defensible and understandable.'
- 'Punishment as it is practised in North American and western European societies is in need of significant reforms.'
- 'Any account of punishment to be useful must provide us with criteria for evaluating whether current practices are in need of reform, and whether concrete proposals for reform constitute genuine improvements.'

143 Ibid 6.

144 Ibid 7.

145 Ibid.

146 Ibid.

‘Legal systems arise ... in response to a universal human need for cooperation as well as human vulnerability to violence, or to the use of force as a means for achieving human objectives. Law provides a potentially useful way of resolving disputes in a manner that encourages cooperation and reduces recourse to the use of force in the settling of disputes. Legal systems seek to accomplish these goals by giving designated officials the authority to make, change, interpret, and enforce laws. The use of this authority is morally justified ... when it reduces recourse to the morally justified use of force in dispute settlement.’<sup>147</sup>

Law, in this connection, implies the monopolization of force by the state. Every legal system turns on the state's ability to deploy force to settle disputes. The alternative is an informal system which leaves the right to use force in the hands of the individual, who is free to resort to it according to his moral sensibilities.

The formal-informal dichotomy is replicated in Cragg's distinction between the legal point of view and the moral point of view. He defines the legal point of view as follows:

‘It is the view that the law is a system of overriding rules, rules that take precedence over competing obligations or desires where there is a conflict. From the legal point of view individuals are not free as individuals to decide; what the law is; what interpretation of the law shall prevail; when the law is applied to particular cases; and whether to do what the law requires.’<sup>148</sup>

The legal point of view can only be operationalized within a formal criminal justice system, which in turn necessarily eliminates the use of violence as an individual right. It is a view which, in a word, holds the law and its cognate institutions supreme.

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<sup>147</sup> Ibid 8. Cragg's explanation of the historical genesis of legal systems is fraught with the follies of common sense. Historically, the birth of the legal system coincided with the demise of the original co-operation of the pre-historic commune, and with the narrowing of the right to use force from the commune to the state. See Chapter Two above. Cragg transposes present and past. The current need for co-operation and protection against violence is, in part at least, a direct consequence of the rise of the legal system.

<sup>148</sup> Ibid 83.

The moral point of view, by contrast, is premised upon the overriding quality of moral rules:

‘It is a point of view that makes the individual the final authority in determining her own conduct. That is to say, from the moral point of view individuals have a responsibility to determine: what the content of morality is; how particular values or principles apply in particular situations or cases; and then to act on their own assessment of what, morally speaking, they ought to do.’<sup>149</sup>

The moral point of view, then, raises each individual to ‘the status of an autonomous moral agent’.<sup>150</sup> This status includes the right to use violence to resolve disputes. The moral agent is endowed with the right to use violence as an individual right.

The legal and moral points of view are or, at least, appear to be logical incompatibles.<sup>151</sup> The one is viable only to the extent that the other is overridden. The legal point of view requires a formal system of dispute resolution, whereas the moral entails an informal system. The latter is premised upon individual moral autonomy, the former upon the subsumption of such autonomy under the legal authority of the state. Cragg's solution to this ‘striking difficulty’<sup>152</sup> is to defend the legal point of view against the moral point of view on moral grounds. In this regard he suggests that there might be:

‘reasons for thinking that under certain conditions moral considerations might justify shifting from a moral to a legal point of view.’<sup>153</sup>

He thus seeks to ground his support for a formal criminal justice system in moral argument. The legal point of view triumphs over the moral point of view because it is morally desirable that it should.

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149 Ibid 85.

150 Ibid.

151 Ibid.

152 Ibid.

153 Ibid 86.

What are the conditions under which morality favours the legal point of view over the moral point of view? For Cragg, it is essentially the moral problems posed by the random use of violence to settle disputes which make the case for the legal point of view. He argues that unregulated violence has both an immoral and an anti-moral character.<sup>154</sup> It is immoral because it leads invariably to harm which is unjust. It is anti-moral because it undermines responsible moral agency and threatens the moral status of its victims. Despite the immoral and anti-moral nature of violence, it is justifiable on moral grounds when it is used to defend moral principles or positions.<sup>155</sup> Thus, says Cragg:

‘morality can be and frequently is used to justify a method of resolving disputes that is implicitly both immoral and anti-moral.’<sup>156</sup>

Institutional violence, then, is a morally defensible method of dispute resolution. Its moral superiority over free violence validates the law's reliance upon it, despite its inherently anti-moral and immoral character.

It is here that the legal point of view becomes morally significant. It puts an end to ‘the free use of force’.<sup>157</sup> Unregulated, informal violence gives way to a formal system of adjudication which operates ‘by shifting authority to use force in settling disputes from private individuals to the state’.<sup>158</sup> According to the legal point of view only the state is competent to use force to settle disputes. Indeed, according to Cragg, the right of the state and its criminal justice personnel to use force to ensure compliance with the law is ‘a necessary feature of legal systems’.<sup>159</sup>

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154 Ibid 88.

155 Ibid 90.

156 Ibid 91.

157 Ibid 88.

158 Ibid 91.

159 Ibid.

Cragg acknowledges that there is a central contradiction here. He terms it the paradox of coercion. It is a paradox generated by the fact that legal systems rely upon violence to dissuade legal subjects from resorting to violence. As he puts it:

‘The function of coercion in legal contexts is to ensure that disputes are settled in accordance with the law.’<sup>160</sup>

The authority of law requires that individuals, if necessary, be forced to comply with the legal parameters of dispute resolution. The legal point of view rests, in the final analysis, upon the power of the state to enforce its adjudicatory regime violently. This is indeed a paradox. A system designed to prevent violence stands or falls by the efficacy of its potential for violence!

Cragg does not consider this paradox to be fatal to his argument that criminal conflicts be adjudged from the legal point of view. He considers that a moral justification for law and the legal point of view exists, in that law reduces the individual's propensity to resort to violence in situations where such a course of action may be morally justified. He puts the argument thus:

‘A shift from the moral to the legal point of view would be justified ... where it could be shown that approaching the resolution of disputes from a formal, i.e. legal, perspective rather than an informal one would reduce the free use of force that would be morally justifiable otherwise.’<sup>161</sup>

For Cragg, then, law is morally defensible because it functions as a brake upon indiscriminate and uncontrolled violence. Of course, this function is successful only because the law itself is a violent construct. But that is an acceptable and legitimate price to pay for freedom from the regime of arbitrary violence entailed in the moral point of view.

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160 Ibid.

161 Ibid.

Despite his restorationist aspirations, Cragg is unequivocal about coercion as a necessary element of the legal point of view. Thus, he posits that ‘the compulsory character of law, formally insisted upon, is an essential characteristic of legal systems’.<sup>162</sup> Law must, by definition, be rooted in coercion. The authority of the law depends upon its enforcement ability. A regulatory system which cannot compel obedience is not a legal system. ‘Without this, the law is not binding and hence not law.’<sup>163</sup> Legal systems cannot tolerate moral objections to their authority. Such objections reduce to an assault upon the viability of the system. Hence Cragg’s proposition that:

‘Legal systems *must* remove from individuals the right to choose not to obey the law even on moral grounds and must be prepared to compel compliance where compliance would otherwise not occur.’<sup>164</sup>

There is, in other words, no place for the sovereignty of the moral point of view in a legal system. To the extent that there is a contradiction between law and morality, the legal point of view trumps the moral point of view. The supremacy of the legal point of view is, however, based in morality, for the compulsion which it brings to bear upon the recalcitrant subject serves to reduce recourse by individuals to the free use of morally justifiable force.<sup>165</sup>

From law, Cragg moves on to law enforcement. He argues that the enforcement of law can be morally justified in much the same way as law itself can be morally justified. Thus, he submits that:

‘A morally justifiable reason for enforcing the law is to reduce morally justifiable recourse to the free use of force in the resolution of disputes.’<sup>166</sup>

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162 Ibid 100.

163 Ibid.

164 Ibid, original emphasis.

165 Ibid 101.

166 Ibid 106.

This is simply the justification of law taken a step further. Law enforcement is, in this regard, law put into practice; it is the activation of the moral justification of law; it is the operationalization of the legal point of view. But it is also the servant of the law. The ultimate goal of law enforcement is ‘to build public confidence in the law’.<sup>167</sup>

There are, according to Cragg, three functions which may be performed by law enforcement. These are:

- The demonstrative function: to demonstrate wide respect for the law by both legal subjects and law enforcement authorities.
- The persuasive function: to persuade legal subjects to obey the law.
- The enablement function: to enable legal subjects to obey the law.<sup>168</sup>

Cragg is concerned with the sentencing component of law enforcement. He argues that, as such, the sentencing process should exhibit the demonstrative, persuasive and enablement functions of law enforcement. In respect of sentencing, ‘all three functions become a part of a single focused action or process directed as a rule at a single individual’.<sup>169</sup>

However, the pursuit of these functions must occur within the precincts of three principles of constraint. These are:

- The respect for moral autonomy principle: This principle recognizes that the use of force undermines the moral autonomy of the participants, and hence seeks to reduce recourse to the use of force.<sup>170</sup>
- The minimum force principle: This principle requires that whenever its use becomes necessary, force should be kept to a minimum. Hence, ‘to use

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167 Ibid 132 & 147.

168 Ibid 116-117.

169 Ibid 146.

170 Ibid 132.



more force than is required to accomplish legitimate enforcement objectives is morally unjustifiable'.<sup>171</sup>

- The diversion principle: This principle is an anti-coercion principle, a 'restraint in the use of force'.<sup>172</sup> It requires that 'when faced with the need to resolve a dispute or end a conflict, an authority ought to use the least coercive method available of ensuring compliance with the law'.<sup>173</sup>

These principles coalesce in a commitment to the minimization of state violence. Whenever possible, a law enforcement agent should avoid recourse to violence. If violence is unavoidable, only so much should be deployed as is morally defensible.

It is in the context of the interaction of the triad of functions of law enforcement and the triad of constraints upon law enforcement that Cragg proceeds to construct his theory of sentencing. His approach to sentencing is derived directly from his submission that 'the basic function of law is to reduce recourse to violence in the resolution of disputes'.<sup>174</sup> Law enforcement is thus, logically, about resolving disputes with minimal force and hence 'sentencing is properly regarded as an activity whose goal is conflict resolution'.<sup>175</sup> For Cragg, then, criminal behaviour entails conflict, which has to be resolved. Direct engagement and discussion between the parties is 'the preferred method of resolving disputes'.<sup>176</sup>

However, Cragg's approval of the application of dispute resolution to criminal justice is bedevilled by his recognition that its conventional context is informal or non-legal. He appreciates that dispute resolution is, genetically, a

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171 Ibid 103.

172 Ibid 132.

173 Ibid.

174 Ibid 178.

175 Ibid.

176 Ibid 179.

privatized conception. Its *modus operandi* is mediation which, too, is constitutionally conjoined to a non-public notion of conflict regulation. Cragg does not hesitate to opine that the attempt to transfer the mediation process to a formal or legal context is fundamentally problematic:

‘There have been many attempts to find a place for mediation within the sentencing and correctional process. Most involve attempting to introduce mediation between the offender and victim and/or the offender and the authorities. The essential problem with the model is that it conflicts with basic features of the formal legal process. It is an attempt to divert disputes from a formal, i.e. legal, to an informal, i.e. non-legal setting. In many cases it is advanced as an alternative to the law and implies a lack of confidence in law as a way of resolving disputes.’<sup>177</sup>

For Cragg, mediation is not to be countenanced as ‘an alternative to the law’. The private resolution of criminal disputes is unacceptable. The integrity of the law and its ability to deal with criminal conflict are not negotiable. It is not an option to replace the public and legal process of dealing with crime with a procedure which is non-public and non-legal. He is adamant that the law provide the definitional setting within which criminal conflict is resolved:

‘A criminal offence ... brings an offender into conflict with the law itself. The law defines the dispute and stipulates appropriate responses. To introduce genuine mediation is to move the dispute from the jurisdiction of the law and make the applicability of the law a matter of negotiation, an approach which is an alternative to the law, not a development of it. It would seem therefore that the criminal law itself is an obstacle to the direct application of a mediation model.’<sup>178</sup>

The relation of criminal justice to mediation is thus fundamentally antagonistic. The advance of the one necessarily entails the demise of the other. Cragg is the champion of criminal justice and hence will not brook the insinuation of the mediation model into the criminal justice paradigm.

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177 Ibid 180.

178 Ibid.

Cragg's critique of mediation does not, however, imply an abandonment of the conflict resolution theory of sentencing. His objection is to mediation, not to conflict resolution *per se*. His concern is to ensure that mediation does not oust the law. Criminal justice is the domain of the state and must remain so. Thus he declares that:

‘It is the idea that the mediation might replace formal sentencing or that the role of the court could be changed to that of mediator between offender and victim that is inappropriate. The dispute is with the law. The court is a party to the dispute and is committed to the legal point of view. The court as sentencing authority is not neutral; neither is it equal.’<sup>179</sup>

For Cragg, then, the legal point of view must inform sentencing practice. Mediation is a manifestation of the non-legal point of view and is thus incompatible with upholding the authority of the law.

At this point, Cragg is faced with a conceptual dilemma: he needs to reconcile his rejection of the anti-law impetus of mediation with his approval of the pro-law potentialities of sentencing as conflict resolution. His solution is simple. He draws an analytical separation between mediation and conflict resolution. There is, for Cragg, no necessary coincidence between the two. He submits that ‘the principles of conflict resolution apply whether there is mediation or not’.<sup>180</sup> Mediation is merely a particular application of the principles of conflict resolution;<sup>181</sup> it is ‘a strategy for introducing the principles of conflict resolution into a dispute’.<sup>182</sup> Cragg argues that these principles are compatible

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179 Ibid 181.

180 Ibid.

181 Cragg (ibid 181-182) identifies four basic principles of conflict resolution:

- ‘Be friendly but firm’;
- ‘Undertake to understand the opponent’s position and to communicate one’s own’;
- ‘Focus on common interests and propose solutions that an opponent is likely to have an interest in accepting’;
- ‘Be prepared to make unilateral gestures of cooperation’.

182 Ibid 181.

with the legal point of view and may be mobilized without recourse to mediation. In other words, they can be implemented without challenging either the jurisdiction or the sovereignty of the law.

He submits that the principles of conflict resolution are consistent with the demonstrative, persuasive and enablement functions of law enforcement. Each of the functions of law enforcement is simultaneously a principle of conflict resolution. Hence, both conflict resolution and law enforcement seek to demonstrate respect for the law; both seek to persuade people to obey the law; and both seek to enable people to live within the law.<sup>183</sup>

Of the three functions of law enforcement which he identifies, Cragg allocates the primary position to persuasion. He states:

‘If the purpose of sentencing and corrections is conflict resolution, then a central purpose of sentencing and correction is persuasion.’<sup>184</sup>

The aim is to convince people to comply with the law voluntarily. Sentencing practice should impel legal subjects towards the conclusion that legal obedience is an admirable desideratum. The priority of persuasion is founded directly upon the three principles of constraint which Cragg considers ought to govern sentencing practice, namely, the moral autonomy principle, the minimum force principle and the diversion principle. These principles determine that law enforcement ought to be first and foremost about persuasion, and certainly always before it is about coercion. Cragg makes the point thus:

‘It is the need to control the free use of force that justifies the use of force in enforcing the law. Hence, the goal of enforcement must be to achieve compliance through moral suasion, that is to say, by bringing those not otherwise disposed to obey the law to the view that compliance with the law is warranted.’<sup>185</sup>

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183 Ibid 183-184.

184 Ibid 185.

185 Ibid 187.

Cragg's approach to sentencing may thus be summed up as follows: it is an exercise in conflict resolution directed at convincing offenders, via moral suasion, to respect and obey the law. The ultimate objective is to develop public confidence in the law.

Trust, according to Cragg, is a crucial component of all human relationships.<sup>186</sup> Crime undermines trust, and leads to a loss of confidence in the law. Resolving the conflict engendered by non-compliance with the law helps to rebuild trust, and hence to restore public confidence in the law's ability to protect people from harm. Sentencing as conflict resolution is in large part an exercise in affording the offender the opportunity to re-establish the trust which his offence has subverted.<sup>187</sup> It seeks to communicate that people can and should be trusted to obey the law.<sup>188</sup> The rebuilding of trust requires that the offender repair the harm he has caused. Sentencing which aims at resolving conflict allows for this, and is thus an expression restorative justice.

The conflict resolution approach to sentencing implies that 'non-custodial sentences are clearly the preferred sentencing option'.<sup>189</sup> Capital punishment and incarceration are at odds with a conflict resolution model and should be avoided whenever they are not required to protect the public and to maintain confidence in the law. Cragg considers that the non-custodial sentence ideally should be a negotiated sentence. The negotiated sentence is most consistent with the principles of conflict resolution and is thus able to represent the views and interests of all affected parties, namely, the offender, the victim, the state and the public. However, for Cragg, the negotiated sentence is not an expression of the

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186 Ibid 142.

187 Ibid 184.

188 Ibid 189.

189 Ibid 192.

supremacy of the moral point of view and its concomitant informalism over the legal point of view. Thus, he states:

‘The search for a negotiated solution is carried out in the context of a commitment to the legal point of view. The purpose of negotiated sentences is to find a solution consistent with the law.’<sup>190</sup>

The negotiated sentence, born of the intersection between the principles of informal conflict resolution and the formalism of the legal point of view, is Cragg's answer to the problem of punishment. It is his version of the restorative sanction.

The final part of Cragg's argument concerns the identification of the theory of punishment that is consistent with his notion of sentencing as conflict resolution. It is worth noting here that he draws a distinction between sentencing and punishment. Sentencing is the penal response of a law enforcement authority to offences, and is aimed at maintaining or rebuilding confidence in the law. Punishment is the infliction of suffering upon an offender; it entails unpleasantness or harsh treatment for the offender. Cragg interrogates the relationship between sentencing and punishment thus:

‘First, is punishment an unavoidable component of law enforcement? Second, does just law enforcement require that sentencing authorities deliberately or intentionally inflict punishment on offenders for their offences?’<sup>191</sup>

His answer to these questions rests upon his differentiating between two definitions of punishment: a philosophical definition and a popular one. The former definition, constructed by philosophers of punishment, conceives of punishment as fundamentally painful, and posits such pain as its aim. The latter definition, expressing the commonsense view, understands punishment as

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190 Ibid 194.

191 Ibid 210-211.

something which is generally unpleasant, but which is not imposed with the express intention of inflicting pain.

According to Cragg, his theory of sentencing as conflict resolution accords with the popular definition, not the philosophical one. He acknowledges that in most cases offenders will experience the sentencing process as punishment which is unpleasant and painful. He continues:

‘But if the goal is conflict resolution, the penalties will be imposed or agreed not with the aim of causing suffering, but with the aim of resolving conflict. It is true that the process will be engaged in with the knowledge that the outcome will probably be experienced as painful by those subjected to it. But it will not be engaged in *for the purpose of causing suffering*. And the solutions arrived at will not be advanced because of their pain-causing character.’<sup>192</sup>

Sentencing will involve a form of hard treatment for offenders. For those who are unwilling to participate in the restorative process, sentencing will be an unwanted imposition of control by means of hard treatment. For the co-operative offender, the restorative process is necessarily ‘burdensome and unpleasant in some respects’.<sup>193</sup> All conflict resolution involves an element of pain. Thus, punishment is an ‘unavoidable component’ or a ‘logical concomitant’ of sentencing conceived as conflict resolution. But, that is ‘not its proper purpose’.<sup>194</sup> The answer to his first question is thus affirmative; to his second, negative.

For Cragg, then, the philosophical definition of punishment, which embraces the intentional infliction of suffering, has no place in the restorative justice project. The commonsense or popular definition, which recognizes some form of pain as part of conflict resolution, is the approach which accords with the

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192 Ibid 213, original emphasis.

193 Ibid 214.

194 Ibid 216.

pursuit of restorative justice. It accepts that most sentences may have a punitive aspect for the offender. But it rejects the notions that sentencing is punishment practice and that the rationale of a sentence is to punish the offender. In the popular view, sentencing ought to be a restorative justice practice. It ought to be the restorative sanction.

Cragg approaches restorative justice from the legal point of view. This view entails a formal, state-run criminal justice system, which is necessarily coercive in at least some of its aspects. State punishment is one such coercive aspect. In response to the perennial difficulties of justifying state punishment, Cragg suggests an alternative approach which re-conceptualizes the problem:

‘If punishment is hard to justify, perhaps we should set aside attempts to justify it. This is not the same as arguing that it should be abolished. However, what it does suggest is that we should seek to understand the function of sentencing in other terms.’<sup>195</sup>

His alternative is to understand crimes as conflicts between the state and the offender, and to recast sentencing as an exercise in conflict resolution. According to him, this approach allows for the importation of the informalities of conflict resolution into the formal criminal justice process. In this way state punishment is divorced from its traditional associations with imposition of intentional suffering, and the legal point of view becomes compatible with restorative justice. He describes his theory of restorative justice as one that:

‘accepts the inevitability of punishment as a feature of criminal justice, but goes beyond the traditional accounts by suggesting that, while punishment is unavoidable, imposing hard treatment is not the purpose of sentencing but rather its result. The purpose of sentencing is and ought to be restorative justice.’<sup>196</sup>

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195 Ibid 142.

196 Ibid 9.



And the key to actualizing the restorative motif of sentencing and of law enforcement in general is to comprehend and harness the principles of conflict resolution as the defining attribute of the practice of punishment.

#### 4.6 Critique of Cragg

Cragg wishes to see the emergence of a state-sponsored restorative justice. The theory which he constructs in *The Practice of Punishment* is designed to develop and defend this vision. He wants the existing criminal justice system to take on a restorative tenor. He believes that the primary deficiency of the criminal justice system is its sentencing practice, which is currently aimed at punishing the offender. He theorizes the demise of sentencing as punishment and its replacement with sentencing as restorative justice.

This approach puts him at odds with the likes of Christie and Braithwaite & Pettit who theorize a comprehensive restorative justice which, ultimately, would be completely independent of the state and its institutions. Cragg adheres to the partial version of restorative justice, in terms of which the state would continue to hold the position of prime protagonist. He envisages a transformation from criminal justice to restorative justice within the institutional parameters of the extant system. He also suggests that the non-custodial restorative sanction is not appropriate for all crimes. Certain crimes may cause such extensive harm or lead to so profound a breach of trust 'that only a long period of incarceration could begin to restore the damage caused and the fear engendered'.<sup>197</sup> For Cragg, then, restorative justice is statist and partial. It is to be implemented via the institutional apparatus of the criminal justice system, and it is to be applicable only to those offences which are not serious enough to place themselves beyond the bounds of the restorative sanction.

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<sup>197</sup> Ibid 217.

Varona has classified Cragg's as 'a conservative theory of restorative justice',<sup>198</sup> in relation to those theories envisaging a restorative justice which is premised upon the abolition of the criminal justice system. This classification is correct. Whereas comprehensive restorative justice would eject the state as a party, Cragg insists that the state has to be an integral component of the restorative process. To be sure, he devotes considerable attention to analysing critically the traditional theories of punishment, including those which seek to promote a hybrid of retributionism and utilitarianism.<sup>199</sup> But he never questions the statist premise which forms the bedrock of all theories of punishment. Indeed, he accepts a pivotal role for the state as both necessary and unavoidable. His confrontation with criminal justice is not radical, in the sense that Christie's is and Braithwaite & Pettit's can be. He leaves intact and unchallenged the first postulate of the criminal justice system. He is, in this regard, indubitably conservative in his proposals for a regime of partial restorative justice. However, he merits consideration because he has theorized the middle road which he has chosen. There are very many restorationists who subscribe to the same basic position taken by Cragg.<sup>200</sup> They, too, proceed from the premise of state commitment to restorative justice. He is, however, one of the few who has elaborated a coherent theory of partial restorative justice.

The partial restorative justice project reduces to the pursuit of a *via media* between the regimes of state-sponsored criminal justice and non-state comprehensive restorative justice. The objective is to construct a compromise, in terms of which the state becomes the patron of restorative justice. Cragg's theory

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198 Varona (1996: 49).

199 See Cragg op cit chapters 1-3.

200 Indeed, it appears that most of the advocates of restorative justice adhere to its partial variant. The initial enthusiasm for Christie has subsided somewhat. Whereas his basic argument that criminal conflicts are forms of property which have been stolen from their owners remains a restorationist orthodoxy, its abolitionist implications have been sidelined for the most part.

of partial restorative justice is one such notable attempt. He tries to produce a theory which combines the statist essentials of criminal justice system and the anti-statist tenets of restorative justice. He forgets, however, that restorative justice is genetically opposed to criminal justice, and makes sense only in its relation of contrariness to the statist postulate. He does not comprehend that the relationship between criminal justice and restorative justice is a dialectical one: their composition is always fundamentally antagonistic. In his quest of a *via media*, Cragg seeks to construct a unity of criminal justice and restorative justice which suppresses the ontological contradictions between their elements.

He deals with the anti-statist impulse of restorative justice by trivializing it. He suggests that punishment is 'a natural feature of human existence' and considers that state punishment is an inevitability of contemporary social life. Attempts to abolish it are invariably dismissed as 'impractical, or silly, or hopelessly utopian'.<sup>201</sup> Cragg constructs this argument empirically, on the strength of what he perceives to be the 'common sense picture of punishment based on everyday experiences' of crime and criminal justice.<sup>202</sup> For him, experience teaches that we cannot do without state punishment, and common sense dictates a conjoining of statism with those tenets of restorative justice which are compatible with it.

This defence of the necessity of the statist postulate is but one instance of the empiricism which runs like an unbroken thread through *The Practice of Punishment*. Cragg transforms common sense into a theoretical resource. He does not trust 'abstract theorizing' and seeks to locate his theoretical project in the common sense of 'everyday accounts of punishment'. The appeal to and reliance upon common sense is a hallmark of the empiricist epistemology, which comprehends experience as the crucial source of knowledge. Benton explains:

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201 Cragg op cit 10.

202 Ibid 11.

“‘Seeing is believing’; ‘the proof of the pudding is in the eating’; ‘I saw it with my own eyes’ ... These are the common-sense attitudes which empiricism articulates into a philosophical theory. Central to empiricism, then, is the conception of a human subject whose beliefs about the external world are worthy of the description “knowledge” only if they can be put to the test of experience.’<sup>203</sup>

Cragg is a true believer in the production of experience-based knowledge. For him the commonsensical and the quotidian are the necessary counterweights to the dangers of ‘abstract theorizing’. He is suspicious of formalism and seeks to avoid its excesses by enlisting the informalism of the sensuous as a theoretical resource. Hence, his argument is suffused with references to such typically empiricist notions as common usage, everyday discourse, wide consensus, the popular mind and the proposition which has the character of a truism. He also places much analytical reliance upon such standard empiricist linguistic devices as ‘we all know’, ‘we assume’, ‘normally we expect’, and ‘is seen by many’. Cragg's theoretical programme is essentially to construct an empiricist guardrail around the supposedly speculative fancies of abstract theory.

Of course, as suggested by Benton, such a strategy is itself an exercise in theorizing. If empiricism is anti-theory, it is by no means atheoretical. The concept of common sense, by which Cragg places so much store, is a profoundly theoretical concept and is central to the empiricist epistemology. Common sense is experience raised to a category of knowledge, it is the concrete rendered conceptual. As should be evident from the expository section above, there is much and often sophisticated theorizing contained within the pages of *The Practice of Punishment*. But Cragg's stated goal throughout his theoretical meanderings is ‘to construct an approach to punishment that was consistent with common sense’.<sup>204</sup> His endorsement of informalism is, in this regard, an

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203 Benton (1977: 21).

204 Cragg op cit 204.

endorsement of common sense born of day-to-day experience. And the theory which he articulates is a theory steeped in the presuppositions of empiricism.

From a Marxist perspective, empiricism and its epistemological strategies are methodologically incapable of producing coherent knowledge of the object of analysis. The epistemological crux of empiricism consists in the belief that knowledge is 'defined by the object of which it is knowledge'<sup>205</sup> In other words, knowledge of the object exists in the object as a condition which antedates the intervention of the subject. This is a profoundly undialectical and, ultimately, reactionary approach to the production of knowledge, for it uncritically accepts as truth whatever is given by experience and validated by common sense. Empiricism takes no account of the subject-object dialectic, and hence of the centrality of contradiction in the development of knowledge.

When Cragg employs 'everyday accounts of punishment' as a methodological tool in the elaboration of his theory of restorative justice he is marking that theory with the imprint of empiricism. He is saying that such accounts are the commonsensical derivations of the day-to-day practice of punishment, and that restorative justice is to be comprehended in terms of the knowledge which such practice produces. The knowledge thus gained, according to Cragg, is the truth that crime is best dealt with in terms of conflict resolution, and that the purpose of sentencing is not punishment but restorative justice.

The theory of restorative justice which Cragg constructs highlights the poverty of the empiricist epistemology upon which he relies. I shall discuss three overlapping aspects of the Marxist critique of empiricism. Firstly, the empiricist

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205 MacCabe (1985: 61).

focus on experience implies that 'all knowledge is reducible to atomic propositions which correspond to discrete impressions, sense data, and the like'.<sup>206</sup> Knowledge, on this account, is 'mechanically constructed out of a series of "concrete" experiences'.<sup>207</sup> Empiricism, then, theorizes knowledge production as a process by which a pre-existing truth is extracted by the subject from the object which contains it.<sup>208</sup> The mode of such extraction is experience and the knowledge so obtained is validated according to the precepts of common sense. Empiricism imports into knowledge production the same credo of atomism which characterizes commodity production. Such a theory of knowledge is directly opposed to dialectical materialism, the Marxist epistemology, which holds that knowledge is produced in the confrontation between subject and object within the parameters of a determinate configuration of the social relations of production. There is, in other words, always a material particularity and historical specificity to the production of knowledge.

Cragg's discussion of the element of trust in human relationships is illustrative here. He believes that we place much reliance upon trust but that the extent to which we do so is 'not always noticed'.<sup>209</sup> He considers that criminal conduct entails a breach of trust and that restorative justice is about the healing of that breach. He offers no especial argument for the centrality of trust in human affairs, except the implied one that he has noticed it. In other words, he has seen it, he has sensed it, he has encountered it. For him, it is an uncomplicated and uncontroversial truth, an immanent aspect of human nature and derived therefrom empirically, by common sense. It is a discrete datum which he has gained by experience and observation. Such is the empiricist production of knowledge.

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206 McLennan (1982: 147).

207 Pilling (1980: 27).

208 See Althusser (1970: 35-36).

209 Cragg op cit 142.

The material and historical conditions in which trust is created or destroyed matter nothing; neither do the contradictions between individual trust and class power. For Cragg, all that matters is the knowledge of the role of trust in human relationships which he has perceived and procured empirically. For Marxism, any such knowledge needs to be comprehended critically, in relation to the social relations of production which constitute its material milieu, and with a view to discerning its internal contradictions. The empiricist epistemology is fundamentally uncritical. The cubits of knowledge which it produces are unreliable as analytical resources or explanatory tools. Unless it is apprehended critically, the trust by which Cragg sets so much store has as much potential to obfuscate the nature of human relationships as it has to clarify it.

Secondly, empiricism entails the fetishization of common sense. It raises common sense to the status of an analytical category and endows it with the power of explanation. *Explanans* is transfigured into *explanandum* and becomes the portal to the acquisition of knowledge and the discovery of truth. This is methodological aberrancy, even in terms of the precepts of formal logic: an effect of the object of analysis cannot legitimately be incorporated into mapping the aetiology of such object. Everyday accounts of punishment are a commonsense response to the problem of criminality. Like all lay accounts and ordinary appraisals, they need to be explained.<sup>210</sup> They are problematic in that they constitute an aspect or a variable of the problem of criminality. They cannot, therefore, be relied upon as an analytical tool.

Recall one of the ‘deeply held beliefs about punishment’ identified by Cragg above: ‘Something like punishment as we understand it is an unavoidable element

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210 The importance of explaining everyday accounts is highlighted in Antaki (1988), a collection devoted to the elaboration of methods of analysing such accounts.

of modern social life.’ The veracity of the statement may be granted and need not detain us. It is a commonsense proposition which occupies a key place in the theory of restorative justice which Cragg goes on to construct. It is the basis upon which he dismisses as misguided calls for the abolition of punishment. And it provides him with a rationale for his defence of the extant criminal justice institutions. However, we do not know why people believe in the inevitability of punishment and how they came to hold this belief. Presumably, the belief has developed empirically and has been distilled from the popular experience of crime and punishment. But that experience needs to be interrogated. We need to understand the material conditions of ‘modern social life’ in order to understand the process by which experience engenders a commonsense belief in the necessity of punishment. We need to understand why and how the social relations of production of the capitalist mode of production beget a general belief in the inevitability of state punishment. Cragg does a methodological somersault. He begins at the end, that is, he takes as his premise that which is comprehensible only as a conclusion. The commonsense conviction that punishment is unavoidable has no inherent analytical value. To think otherwise, as Cragg appears to do, is to fetishize it.

Thirdly, empiricism is unable to go beyond the form of the relations which it encounters. Their content remains a mystery. The empiricist operates at the level of appearances, and the common sense upon which he relies routinely transfigures form into content. Sumner makes the point thus:

‘The practice of empiricist epistemology tends to push etiological social science into a cul-de-sac. It seems to divert attention from the specificity of a thing and direct research towards its forms of appearance.’<sup>211</sup>

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211 Sumner (1979: 189).



This is a direct result of the atomism which suffuses its epistemology, and of its failure to pursue the structural context of the discrete empirical events which purportedly deliver knowledge.

Marxism, by contrast, understands that concrete experience seldom reveals the true content of the social relations to which it pertains, and that commonsense verdicts are invariably located at the formal level. Sumner again:

‘Dialectical materialism, the method of Marxian analysis, demands that things be grasped not only as they appear in a particular manner and context in a given social practice, but also, and most importantly for the purposes of explanation, in their condition of existence and forms of development.’<sup>212</sup>

For Marxism, form and content are dialectically conjoined. Hence, knowledge of the relation is to be acquired by analysing the process by which its content necessarily gives rise to a form which, more often than not, has the effect of concealing or distorting the content.<sup>213</sup> Sumner explains the difference between empiricism and Marxism in the following terms:

‘It was one thing for Saint-Simon and Proudhon to observe spontaneously that poverty and misery appeared to be endemic to modern Western economies. But it was another thing altogether when Marx explained that the inner logic of the capitalist mode of production necessitated the existence of poverty and misery on a national and on, eventually, a global scale.’<sup>214</sup>

Empiricism relies upon and responds to the appearances derived from experience; Marxism seeks to comprehend the material basis from which such appearances necessarily arise.

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212 Ibid 190.

213 Ibid 188.

214 Ibid 187.

The meagreness of Cragg's empiricism is illustrated in his discussion of the nature of state and law in the social formations which constitute his analytical terrain. Unlike so many legal analysts, Cragg does perceive the essentially violent character of the state and the fundamentally coercive constitution of the law. The conventional approach concedes, as Atiyah does, that 'in any modern state there is a practical need for the use of force in the last resort to enforce much of the law'.<sup>215</sup> But the violence of state and law is invariably recognized only in an ultimate sense, as an attribute which acquires relevance only in the final analysis, when persuasion fails. Cragg has the merit that he breaks with this conventional wisdom and foregrounds the compulsion upon which law and state are founded. He is one of the few non-Marxists to comprehend the state as a structure-in-violence, and to discern that law is inherently coercive in its regulatory and adjudicatory practices.

However, this advanced insight does not correspond to an advanced theory of restorative justice. Indeed, as intimated earlier, Cragg's effort is theoretically impoverished in comparison to the theories produced by Christie and Braithwaite & Pettit, who do not grasp the violent architecture of legal relations in the way that he does. This is a curiosity which is attributable directly to the fact that Cragg procured his apprehension empirically, as the commonsense product of a keen (but empiricist) observation of political experience and legal practice. To 'discover' that the state is really a fundamentally violent institution and that legal relations are coercive not in the final but in the first analysis is, to mimic Sumner, one thing. However, it is another thing altogether to explain how this has come to be so and why it should necessarily be so. The 'contemporary western European and North American societies' to which Cragg refers are each and every one capitalist social formations. They are permanently rent by a class conflict which structures their social relations of production. Their economies are exchange

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215 Atiyah (1995: 81).

economies demarcated by the commodification of labour-power. Their states are bourgeois states and their legal relations are bourgeois legal relations. These are sociological traits which cannot be comprehended empirically. They therefore do not feature in Cragg's analytic endeavours.

The consequence of this omission is an analysis which does not move beyond the level of appearances and which presumes, incorrectly, that the form which it encounters is the form of the content. Cragg thus produces a theory of restorative justice which turns upon the formalistic acceptance of the inevitability of institutional legal violence. It is a theory which assumes an original violent human nature, and which justifies capitalist state violence morally, with no regard to its structural sources in the social relations of production of capitalism and its role in the reproduction of these relations. It is a theory which embraces the capitalist state as a necessary and rational institution and which intrudes the bourgeois worldview into the problem of criminality. It is a theory which ultimately affirms the relations of oppression and exploitation which reach into virtually every aspect of the social existence of the dominated classes. Cragg's efforts to construct a *via media* amounts, in fine, to an empiricist exercise in the embourgeoisement of restorative justice.

It must, in this regard, be noted that Cragg's legal point of view is virtually coterminous with what Engels refers to as the juridical world outlook. This is the bourgeois worldview. It is the view which holds that law is the fundament of human affairs. It is the ideological expression of the political economy of the commodity. The predominantly theological world outlook of the pre-capitalist era was an obstacle to the free development of the commodity economy. It had to be replaced. The bourgeoisie found the juridical world outlook to be the most appropriate ideational expression of its class interests. Engels explains:

‘The economic and social relations, which people previously believed to have been created by the Church and its dogma – because sanctioned by the Church – were now seen as being founded on the law and created by the State.’<sup>216</sup>

The juridical worldview replaced church with state and religious dogma with law. It was, according to Engels, the theological worldview secularized.<sup>217</sup> It enabled the bourgeoisie to present the commodification and sale of labour-power as transactions between legal equals. The economic exploitation and political oppression of the proletariat were secreted behind their juridical forms of equality and right.

The legal point of view upon which Cragg relies is a re-presentation of the juridical world outlook. Whereas the original target of the bourgeoisie was the power of religion, Cragg sets his sights on the claims of morality. Since Engels's day, the legal equality which the bourgeoisie had championed has been exposed as little more than a form of bourgeois class power. The dominated classes live the fact that equality before the law is no protection against the ravages of the substantive inequality inscribed in the social relations of production of capitalism. The moral point of view is, in this connection, a programme to call the law to account for its failure to make good on its promise of equality.

Proponents of the moral point of view place morality above legality because they perceive the law to have been patently complicit in the reproduction of inequality. They have lost faith in the law and in the juridical world outlook. Cragg has kept the faith. He remains convinced of the continued viability and validity of the legal point of view and has even managed to construct a moral

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216 Engels (1990: 598).

217 Ibid.

argument in its defence. He has countered the moral point of view by impressing its precepts into service of the legal point of view.

Cragg does not confront the contradiction, at the heart of the juridical world outlook, between formal legal equality and substantive social inequality. This omission is a direct and expected consequence of his empiricism, which discourages analytical ventures beyond form. He is both satisfied with and determined to defend the legal point of view for what it is: the ideological form befitting the class dictatorship of the bourgeoisie. If the juridical worldview is the theological worldview secularized, then Cragg's legal point of view is the juridical worldview modernized. If religion is a remnant of the pre-capitalist era, then morality is the harbinger of a post-capitalist epoch. Cragg's interest is in the capitalist present, and the defence of the law against the incursions of morality. He has no use of religion; and he engages morality solely to bolster the legal point of view. He is concerned only to ensure the hegemony of the bourgeoisie and the integrity of its worldview.

Christie is the petite bourgeois radical, who locates the wellspring of restorative justice in a regime of conflicts as property, and who comprehends restorative justice as the antithesis of criminal justice. Cragg, by contrast, is the epitome of the bourgeois radical. For him, restorative justice is simply a variant of criminal justice, an improved version thereof. There is no fundamental opposition between the two. Crimes are conflicts which require resolution, but they are not forms of property. They cannot therefore be disposed of privately, according to the wishes or inclinations of their supposed owners. Crimes represent a challenge to the public authority and hence must be resolved in accordance with the adjudicatory competence of the state. Whereas Christie theorizes a restorative justice liberated from the burden of state management,

Cragg relies upon the statist postulate to prescribe the conceptual limits of his theory of restorative justice.

The direct confrontation between Cragg and Christie occupies only a few paragraphs of the text *The Practice of Punishment*.<sup>218</sup> However, most of what Cragg argues is, in one way or another, an indirect response to the Christie thesis. Indeed, it is arguable that all theories of restorative justice are debates with Christie, in much the same way that all modern (and postmodern) social theories are debates with Marx. Christie is the theoretical doyen of the restorationist movement. Cragg is the neophyte, seeking to make his theoretical mark, as he must, in relation to Christie.<sup>219</sup>

Cragg is simultaneously attracted and repelled by the notion of the private disposition of criminal conflicts. His attraction is evident in his approach to mediation. It will be recalled that he rejected mediation formally because of its inherently private character. However, he then went on to approve the principles of conflict resolution, together with the negotiated sentence, as the preferred road to restorative justice. This amounts to an attempt to overcome the somewhat strained and contrived separation which he erects between mediation and conflict resolution, and to incorporate the advantages of privatization into his theory. His repulsion is apparent from his dedication to the legal point of view and his commitment to the statist postulate of criminal justice. He will not countenance the eviction of the state from the criminal justice process, which eviction is the

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218 See Cragg op cit 140-141.

219 Every new theory has a history. It is constructed in relation to and in terms of its predecessors. No theory is pure, in the sense that it is free of influence of other competing theories. Every new theory is genetically linked at least to the range of theories which traverse more or less the same terrain. The genetic map of Cragg's theory of partial restorative justice is manifest and uncontroversial. Christie is at the beginning, and Christie is at the end.

logical conclusion of Christie's proprietary thesis. Cragg is content with things capitalist, both proprietary and political.

His theory of restorative justice must not challenge or disturb either the capitalist property regime or the central role occupied by the capitalist state in the disposition of criminal conflicts. In the end, he wants to take the benefits which attach to the Christie thesis but seeks to avoid the negative implications it holds for the statist postulate. He is aware of the deep crisis besetting capitalist criminal justice. He knows that something serious has to be done to deal with the problem. However, he cannot conceive of a solution which strays outside the institutional structure of the criminal justice system. Any change must proceed from the premise of the inviolability of the system. Any change must be founded upon the continued primacy of the state in criminal justice matters. Assuring the integrity of the law means ensuring that restorative justice does not call into question the validity of criminal justice.

Cragg wishes to reform the criminal justice system in order to stave off its destruction. Marx & Engels noted a similar impulse behind the reforming zeal of certain elements of the ruling class:

‘A part of the bourgeoisie is desirous of redressing social grievances, in order to secure the continued existence of bourgeois society.’<sup>220</sup>

They continue in inimitable cutting style and critical vein:

‘To this section belong economists, philanthropists, humanitarians, improvers of the condition of the working class, organisers of charity, members of societies for the prevention of cruelty to animals, temperance fanatics, hole-and-corner reformers of every imaginable kind.’<sup>221</sup>

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220 Marx & Engels (1967: 113).

221 Ibid.

Cragg's theoretical endeavours to improve the criminal justice system mark him for a place in this catalogue of bourgeois radicals.

The bourgeois radical is troubled by his own perspicacity. He cannot stand to see the dangers to which his less caring fellows are prepared to expose capitalist society by their rampant greed. He knows that bourgeois rapacity encourages proletarian dissatisfaction, and wants nothing more than to free his world of the spectre of proletarian revolution. He champions reform in order obviate revolution. Marx & Engels say of such campaigners that:

‘They desire the existing state of society minus its revolutionary and disintegrating elements. They wish for a bourgeoisie without a proletariat.’<sup>222</sup>

Cragg replicates all the cares and aspirations of the bourgeois radical in his construction of his theory of restorative justice. His objective is to ensure the reproduction of the criminal justice system and its institutions, but he wants to see also the implementation of those improvements required to prevent the current crisis from becoming the prelude to collapse. He wants a restorative justice which is able to remove the perils which criminal justice is facing. He wants Christie *sans* Christie's dangerous idea that the state is dispensable.

Cragg is aware of the fact that legal systems are historical constructions. He acknowledges that certain societies ‘existed and flourished after their own fashion without formal legal rules’.<sup>223</sup> What is more, for him ‘it is clear that laws are not a necessary feature of social life’.<sup>224</sup> Such admissions must entail an appreciation of the transient nature of bourgeois law and of the possibility that a post-capitalist mode of production may be lawless. This is dangerous knowledge. It is the kind of knowledge which, in the end, leads those who take it seriously to a loss of faith

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222 Ibid.

223 Cragg op cit 83.

224 Ibid 84.



in the law and legal systems of bourgeois society. This is what occurred with Christie and, to a lesser extent, with Braithwaite & Pettit. Cragg is different. He has neither incorporated the dangerous knowledge into nor confronted it in his theoretical work. He treats bourgeois law and state as metatheoretical givens. This is, ultimately, why his theory of restorative justice is a partial one, and why his radicality is bourgeois.

Despite the poverty of its empiricism, it is Cragg's theory of restorative justice that is likely to have the most practical success. He capitulates completely to the sovereignty of the capitalist state. Paradoxically, it is this capitulation which makes his theory practicable, within the parameters of the criminal justice system. Capital will be far more disposed to a restorative justice which defers to the primacy of its state than one which questions that primacy and requires the dismantling of the criminal justice system. However, bourgeois indulgence comes at a high theoretical price.

Anti-statism is the first principle of comprehensive restorative justice. Cragg's entire project may be seen as one dedicated to discovering a theoretical route around this principle, and to construct a state-friendly restorative justice. This is an unenviable, arguably unattainable, task. Theoretical debilitation and analytical obliquity are more or less inevitable for the person who strives, simultaneously, to advance a cause and to jettison its defining postulate. This is exactly what happens with Cragg. In the end, he claims to have solved the problem of punishment simply by redefining its purpose as restorative. His version of restorative justice will cause pain to the offender (in the same way as criminal justice does) but this pain is not punishment because it was not intended to be painful! This is a formulation which borders on the incoherent and veers towards the idealist delusion that change can be achieved by definitional fiat.

However, it is apparently the only solution which Cragg is able to offer to the theoretical problem engendered by his faith in the juridical institutions of the bourgeois state.

Be that as it may, Cragg has already succeeded where the theoreticians of comprehensive restorative justice have failed. Every restorative justice programme operating in the world today is necessarily informed by a version of his theory of partial restorative justice. These programmes exist with the imprimatur and function under the aegis of the national state in their respective countries. Cragg is the theoretician of these partial restorative justice programmes. *The Practice of Punishment* is a sustained attempt to provide partial restorative justice with the anti-anti-statist theory it requires to justify its obeisance to the hegemonic project of capital.

**CHAPTER FIVE**

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## Chapter 5: Marxism and Restorative Justice

This chapter presents a Marxist critique of the theoretical constitution of the restorative justice movement. Therefore, it is itself necessarily a theoretical endeavour. It is concerned to elaborate a theoretical critique of comprehensive restorative justice. This is the version of restorative justice which matters theoretically. Partial restorative justice is a pale fraction of comprehensive restorative justice. Whereas the latter was conceptualized as an alternative to criminal justice, the former has been fashioned as an adjunct thereto.<sup>1</sup> Comprehensive restorative justice thus represents a radical departure from the established presumptions and practices of criminal justice. It constitutes also a decisive theoretical rupture with the conventional approach to the problem of criminality. It therefore demands rigorous theoretical analysis. This chapter attempts such an analysis from a Marxist point of view.

The viability of any doctrine turns, in fine, upon its theoretical premises. Any fundamental critique must therefore engage the doctrine theoretically. A critique which is located at or remains confined to the level of doctrinal principles may uncover operational lacunae or organizational contradictions, but invariably leaves unchallenged the theory underpinning such principles. Despite the theoretical radicality of comprehensive restorative justice, most analyses of it are not properly theoretical, at least not in the way that the trilogy of works analysed in Chapter Four above are.

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<sup>1</sup> Whatever contradictions exist between partial restorative justice and criminal justice are non-antagonistic, and concern primarily defining the sphere of operation of each. By contrast, the contradictions between comprehensive restorative justice and criminal justice are antagonistic, in the sense that the one becomes or remains viable to the extent that the other remains undeveloped or degenerates. They are mortal enemies.

The bulk of the 'theoretical' literature tends to focus critical attention upon the principles of restorative justice and their implications, without interrogating their theoretical presuppositions. A notable example in this regard is Minor & Morrison's *A Theoretical Study and Critique of Restorative Justice*.<sup>2</sup> Despite its titular focus upon theory it is, in the main, concerned with assessing not the theory but the principles of restorative justice. To be sure, it does this in terms of three rival theoretical perspectives, namely, the Dukheimian, Marxist and Foucauldian. But that is not the same as a critical comprehension of the theory of restorative justice. Another illustrative example is *Mind the Gap* by Daly in which, according to her subtitle, she purports to examine 'restorative justice in theory and practice'.<sup>3</sup> However, her notion of theory and practice is the everyday notion of how the stated ideals of restorative justice programmes compare to their actual practices.<sup>4</sup> She does not devote any attention to theory proper, that is, to the epistemological foundations of the stated ideals.

The efforts of Minor & Morrison and of Daly are good indices of the state of restorative justice criticism. It is in a parlous state theoretically. Restorationists have been concerned primarily to expound and popularize the basic principles which constitute their doctrine and have shown but scant commitment to making explicit their own theoretical presuppositions. Analysts of restorative justice have adhered somewhat slavishly to this trend. They have invariably focused their critical comments upon the overt claims of the restorationists and have given but meagre attention to probing their theoretical postulates. The critics have accepted the terrain demarcated by the proponents, with unhappy consequences for the practice of restorative justice criticism.

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2 Minor & Morrison (1996).

3 Daly (2003).

4 Ibid 220 ff.

Of course, no doctrine is ever theoretically unfounded. Even those which profess atheoreticism or which claim to be averse to the supposedly speculative detractions of theory are profoundly theoretical, albeit covertly. The supposedly anti-theoretical idea that the facts should speak for themselves, uncoloured by the structure of a theoretical paradigm, has long been exploded as a theoretical device.<sup>5</sup> Despite its emphasis upon practice, restorative justice is, of course, a theory of criminal justice. And although the theoretical output of its adherents is not its most prominent feature, restorative justice has been theorized, and from more than one perspective.

### 5.1 Proprietary and Non-Proprietary Schools

These theoretical endeavours divide conveniently into two categories, which may be designated proprietary and non-proprietary. The proprietary approach takes the notion of ownership as its theoretical premise. It theorizes criminality in terms of the imperatives of property. In other words, it comprehends criminal justice as a sphere of interaction between property owners, where exchanges are made and settlements are reached according to the private interests of the contending parties. Christie's famous formulation of criminal conflict as forms of property epitomizes the proprietary school. And as argued in Chapter Four above, the republican theory of Braithwaite & Pettit may also be comprehended in proprietary terms and hence as part of the proprietary school. For adherents of this school, the doctrinal edifice of restorative justice is rooted in the proprietary regime of contemporary capitalist society, and proprietorship is the theoretical key to the doing of justice.

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5 See Robertson (1977: 16-17): 'Although it is sometimes thought that "the facts speak for themselves", facts do nothing of the kind. They are silent. They have no meaning until we give meaning to them, and that meaning is given by theory. We are often prone to poke fun at "theorists" and to regard more highly the "practical" person. But theory and practice cannot be separated; virtually every practical decision you make and every practical opinion you hold has some theory lying behind it.'

The non-proprietary theories generally attempt to ground restorative justice upon premises reputedly loftier than the claims of mere property. It appears that they do not wish to entangle justice in proprietary baseness and appeal instead to humankind's putatively higher ethical sensibilities. They seek to link restorative justice, a purportedly higher form of justice than criminal justice, to the higher moral potentialities of the human condition. Hence they construct their theories in terms of such concepts as virtue, goodness, mutuality and trust.<sup>6</sup> Many rely heavily upon the precepts of the Christian worldview, and justify restorative justice according to such ideologies as love, forgiveness, reconciliation, respect and the like.<sup>7</sup> The non-proprietary school thus tends to anchor its theories in universals, that is, those desired and transcendental values which are supposed to hold good for all time and for all forms of human social organization.

As seen in Chapter Two above, most proponents include an appeal to history in their advocacy of restorative justice. By comprehending restorative justice in relation to the proprietary specificities of the capitalist mode of production, the proprietary school incorporates this historicism theoretically. The non-proprietary school, by contrast, is apt to be ahistorical in its theoretical production and to favour the kind of supra-historical notions itemized above.<sup>8</sup> Non-proprietary theorists believe, for the most part, that the notion of privatized restorative justice is simply a better way of doing justice than the extant public criminal justice. And they have made theoretical touchstones, *inter alia*, of the above-mentioned universals which, they would have us believe, constitute us as ethical beings. However, like its proprietary counterpart, the non-proprietary

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6 Cragg's theory of restorative justice, discussed in Chapter Four above, falls squarely within this school.

7 See, for example, Zehr (1995) and Consedine (1999). For a useful discussion of the Christian theories, see Varona (1996: 26-41).

8 This is not to say that they do not seek to justify their theories historically. Rather, it is to say that their theories are not historicist.

school too considers criminal justice a private matter, to be engaged in and negotiated by the parties themselves.<sup>9</sup> In this connection, the two schools have a common theoretical antipathy to the state as the organizational centre and institutional fulcrum of criminal justice. Both are committed unequivocally to restorative justice as privatized criminal justice.

## 5.2 The Primacy of Property

This chapter is dedicated to the critical appreciation of the proprietary approach, as represented by the Christie thesis. This is a focus which emerges logically and inevitably from the relationship between the proprietary and non-proprietary approaches. All theories of comprehensive restorative justice, whether proprietary or non-proprietary, are at one that crime and the response thereto should be privatized completely. If comprehensive restorative justice has a theoretical watchword, it is privatization.<sup>10</sup> It is at the root of the confrontation between restorative and criminal justice.<sup>11</sup> It is the theoretical postulate which imbues restorative justice with its anti-statism. The non-proprietary school embraces and promotes the notion of privatization as easily and eagerly as the proprietary school. However, it avoids or fails to comprehend the necessary theoretical implication of such a position, namely, that in order for criminal justice to be privatized it must be comprehended in proprietary terms.

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9 Even Cragg, who otherwise is eminently statist, postulates that (partial) restorative justice be founded upon the principles of privatized conflict resolution.

10 Of course, partial restorative justice also posits a privatized justice within its sphere of operation. Although it accepts the overall supremacy of public criminal justice, it does expect the state to withdraw from those areas of criminality which are designated for restoration. This partial privatization is subsumed theoretically within the complete privatization required by comprehensive restorative justice.

11 The first target of restorative justice is retribution. However, this is a strategic manoeuvre which derives from the theoretical commitment to privatization. Retribution exemplifies the penal philosophy of statist justice. It is the natural target of choice for restorative justice.



A crime cannot be a private affair unless it is conceptualized as a form of property. Privatization entails property. It is an inherently proprietary notion which summates in private property. Only that which may be owned privately can be privatized. Privatization is about reducing public assets and resources to private ownership and presumes property to be an aboriginal and natural human relation. Privatization which does not produce private property is a conceptual non-starter. It is therefore necessary that the notion of privatized criminal justice, to which the restorationist project is wedded, be founded theoretically upon a proprietary conception of criminality. The non-proprietary school can have no theoretical credence in this regard. Absent privatization, restorative justice is emasculated; and absent private property, privatization is incomprehensible. All roads lead to property.

The matter reduces to this: every theory of restorative justice which takes seriously the argument for the privatization of criminal justice ought to embrace the proprietary postulate. The non-proprietary theories of restorative justice do not comprehend this theoretical imperative and are thus all beset by a basic contradiction, between their avowed commitment to a privatized criminal justice and their evasion of a proprietary notion of crime. This contradiction cannot be resolved within the confines of the non-proprietary approach, for acceptance of the proprietary concept of criminality is fatal to the integrity of any non-proprietary theory.

When all is said and done, the non-proprietary theories are nothing more than exercises in theoretical circumvention. They abstract justice from its socio-economic and historical milieu. They do not confront the fact that the very concept of privatization is, at its core, a proprietary one. The efforts of the non-proprietary school to find theoretical justification for restorative justice outside the parameters of property demonstrate a signal failure to appreciate that the idea

of privatized crime is loaded with assumptions about ownership of property, and makes sense only if property is presumed to be *the* constitutive social relation of production. The contradiction in which the non-proprietary school is caught is a constitutional one. Its resolution entails total victory for the proprietary approach.

Subscribers to the non-proprietary approach will no doubt object, some vehemently, to the proprietary imperative. It does not accord with their self-image. That is an image of crusaders in the name of justice. For them, restorative justice is about doing justice to all parties implicated in a criminal episode. It has nothing to do with the supposed evils of private property or with importing the morality of capital into criminal justice. They would point to the strong Christian motif in many restorationist programmes, a motif which is incompatible with the profit-making principles of private enterprise. Restorative justice is, in this regard, clearly not just another case of *laissez faire* penology. Instead, so the argument would go, it is a method of doing justice which truly does attempt to treat all persons as persons, and which seeks to remove the sense of worthlessness with which both victim and offender are routinely left in the traditional criminal trial.<sup>12</sup>

The non-proprietary school will, of course, also contend that, logically, the fact that Christie has theorized restorative justice in proprietary terms cannot automatically mean that his position is a representative one. In other words, there is no necessary theoretical nexus between restorative justice and property. It is entirely possible to ground restorative justice theoretically in non-proprietary

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12 Here it is worth noting that adherents of the non-proprietary approach habitually refer to the persons for whom they aspire to obtain justice as 'stakeholders', a term heavy with proprietary overtones. The collection edited by Zehr & Toews (2004), for example, devotes more than a hundred of its 400-odd pages to what are called 'stakeholder issues'. This trend appears to be derived from the popular capitalist idea of a 'stakeholder society', in the success of which everyone is supposed to have a proprietary interest. It would appear that property will find its way even to those who would deny it.

concepts, such as trust or respect or virtue. Therefore, the Christie thesis is not authoritative. It is the construction of one theoretician, and is by no means to be understood as paradigmatic. In other words, the assessment of restorative justice cannot begin and end with Christie. Any sensible and defensible assessment must proceed from the premise that the Christie thesis is not coterminous with restorative justice and hence that the critique of Christie is not the critique of restorative justice as a whole. Restorative justice is so much more complex than the notion that criminal conflicts are a form of property. These are some of the objections which are to be expected from the non-proprietary school against the proprietary approach.

However, no school of thought can ever expect to be assessed solely in terms of its self-image. Any theoretical critique of restorative justice, whether Marxist or not, must needs go beyond and behind what the proponents themselves say about or think of (or what they are likely to say about or think of) their project. A Marxist critique must seek to uncover the relationship between restorative justice and the material circumstances of its genesis and existence. It is in the comprehension of restorative justice as the expression of a determinate material context that its objective meaning is to be discerned. This may overlap with its self-image to a degree. But the correspondence between the self-image of a school of thought and its objective assessment is hardly ever complete, and much of the self-image may have to yield to insights which offer a quite different picture. In this regard, the self-image of restorative justice must be relegated to the basement of comprehension. For, despite the anticipated objections, it is submitted that the proprietary approach formulated by Christie does indeed contain the key to a materialist understanding of the theoretical precepts of restorative justice.

### 5.3 Morality and Property

The various concepts upon which the non-proprietary theories of restorative justice rely may all be gathered under the rubric of morality. These concepts are meant to express the values which we, as ethical beings, ought to embrace or, at minimum, those to which we ought to aspire. However, as Engels has shown, the idea of morality is by no means either universal or uncontested.<sup>13</sup> What is right and what is not depends not upon some transcendental moral imperative but upon the material circumstances in which the question has to be answered. And these material circumstances are demarcated invariably in class terms. Thus Engels declares that:

‘men, consciously or unconsciously, derive their moral ideas in the last resort from the practical relations on which their class position is based - from the economic relations in which they carry on production and exchange.’<sup>14</sup>

There is no universal morality, valid for all time. There is only the morality of class at a specific historical conjuncture. Engels continues:

‘We therefore reject every attempt to impose on us any moral dogma whatsoever as an eternal, ultimate and forever immutable moral law on the pretext that the moral world too has its permanent principles which transcend history and the differences between nations. We maintain on the contrary that all former moral theories are the product, in the last analysis, of the economic stage which society has reached at that particular epoch.’<sup>15</sup>

The point is that moral codes are derived from and structured by material relations. Our ethical ideals are not given by or inscribed in moral absolutes. For the most part, they are determined by our material circumstances, not least amongst which are the class interests of their advocates.

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13 See Engels (1934: 106-108).

14 Ibid 107.

15 Ibid 107-108.

Lafargue shows that the historical roots of our moral sense of justice are to be found in the evolution of the institution of property.<sup>16</sup> It was the operation property which prompted the transition from blood revenge to the principle of equivalence, which principle remains the foundation of the ideal of justice. And it was the development of property that put an end to primitive prehensility and instilled into us the belief that justice is coterminous with the right to and freedom of property. In a word, 'property brought justice to humanity'.<sup>17</sup> Pashukanis agrees that:

'the concept of justice is itself inferred from the exchange relation and has no significance beyond this. Basically, the concept of justice does not contain anything substantively new, apart from the concept of the equal worth of all men.'<sup>18</sup>

From the Marxist perspective, then, our notion of justice is deeply contaminated with the spirit of property.

However, it is not only justice that is proprietary to the core. Pashukanis considers that property founds the idea of morality itself. For him, every legal subject is simultaneously a moral subject, that is, 'a personality of equal worth'.<sup>19</sup> And, to anticipate the discussion which is to follow, the ethical form, like the legal form, is rooted in the social relations of the commodity economy. Morality as we know it is comprehensible only in relation to the commodity form, which is the perfect form of private property. And the moral subject:

'embodies the principle of the essential equivalence of human personalities for, in exchange, all forms of labour are equalised and become human labour in the abstract.'<sup>20</sup>

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16 See Lafargue (1975: 161-188).

17 Ibid 184.

18 Pashukanis (1978: 161).

19 Ibid 151.

20 Ibid 152.

In bourgeois society, then, every person has at least two personalities, one legal and one moral. Both are structured by the principle of equivalence. And both are born of the exchange relation which defines the commodity form.<sup>21</sup> Pashukanis again:

‘Moral being is a necessary complement of legal being; they are both modes of intercourse used by commodity-producers.’<sup>22</sup>

Our ethical proprieties are all intimately linked to our proprietary constitutions.<sup>23</sup> And our moral sensibilities are all rooted in our adherence to the principle of equivalence. Property brought us not only justice but also every other moral ideal which we have come to value as an expression of our equal worth as human beings in commodity-producing society.

Theorists of the non-proprietary school of restorative justice have reckoned without the proprietary character of morality in the bourgeois epoch. Whatever high-minded ethical concept they may choose as theoretical keynote cannot detach their theorization from the spirit of property. For the ethical form which underlies each such concept is the conjugate of the commodity form. Twist and turn it as they will, the morality of our theorists will find its way back to property. There is no escaping the proprietary postulate. The theorist who seeks to comprehend restorative justice in non-proprietary terms invariably lapses into idealism. It may be an objective idealism,<sup>24</sup> in the sense that it seeks to analyse restorative justice in terms of one or another ethical universal. But it is idealism no less.

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21 The relationship between the legal form and the commodity form constitutes the theoretical crux of this chapter and is discussed in detail below.

22 Ibid 155.

23 It is surely not entirely coincidental that ‘propriety’ and ‘proprietorship’ are etymological conjunctives.

24 See Chapter One for a discussion of objective idealism as compared to subjective idealism.

## 5.4 Restoration and Property

Indeed, the very idea of restoration is an inherently proprietary idea. That which is restored to a person must have belonged to that person originally. Property is the natural object of restoration. Its natural subject is the owner. Restoration presumes the unlawful loss or deprivation of that which one is legally entitled to have. It is about making good the loss or deprivation, and returning that which was taken, usually by means foul. The goal is unambiguous: to reunite the owner with his property or an equivalent replacement, and thereby to recover the *status quo ante*. The *Chambers 21<sup>st</sup> Century Dictionary* offers a definition of 'restore' which includes the expressly proprietary 'to return something lost or stolen to the rightful owner'. The definition contained in the *Oxford Universal Dictionary* is equally, if not as patently, proprietary: 'To give back, to make return or restitution of (anything previously taken away or lost)'.

Property is entailed in restoration. It is the relationship between the owner and his property which has to be restored. That relationship has been disturbed, and has to be reinstated. What is more, the proprietary relationship is a natural one which has to be recovered. Thus the *Chambers 21<sup>st</sup> Century Dictionary* adds that 'restore' also means 'to bring someone or something back to a normal or proper state or condition'. The *Concise Oxford Dictionary* includes a similar definition of 'restore': 'replace, put back, bring to former place or condition'. The established meaning of the nominal 'restorative' as a health-restoring agent reinforces the idea of a natural or normal relationship which requires repair.

There is embedded in the notion of restoration an idea that a natural proprietary relationship has been rent, and that the aim of restoration is to repair that relationship. The premise is that a person has been deprived of something or access to something that is his or hers. The person may have a right of ownership

in the thing or a right of possession. In either case, it is a proprietary right. And it is a taken-for-granted proprietary right. In other words, the relationship between the person and the thing is understood to be an organic one. Restoration is, in this regard, about re-establishing this relationship when it has been sundered unlawfully. It is about repairing what is considered to be normal and proper, namely, the fundamental proprietary relationship.

Christie grasped this. He understood that restoration was, by definition, about recognizing that the relationship which had been severed and which had to be restored was, first and foremost, a proprietary relationship. One cannot be restored that in which one does not have rights of ownership or, at least, rights of possession. Christie comprehended this simple fact and theorized it as the basis of restorative justice. It is precisely this insight which makes the Christie thesis archetypal. It is an insight which enabled Christie to discard all non-essential factors and focus exclusively upon the relationship which is essential to the comprehension of restorative justice.<sup>25</sup>

All other theories of restorative justice are, at least, one step removed from the crucial proprietary relationship which Christie discerned. Those approaches which theorize restorative justice in terms of notions such as trust or respect or virtue all fail to address the necessary prior question pertaining to the nature of the relationship that needs restoring. The non-proprietary theories all present more or less coherent cases as to why the sundered relationship ought to be restored. Such arguments invariably reach the conclusion that restorative justice is the only viable answer to the crisis of criminality gripping contemporary society. But only Christie tells us, in clear and certain terms, what it is that is being restored or that

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25 The isolation of the essential elements of a relationship is achieved by a process of abstraction. The idea of abstraction and its place in the Marxist methodology is discussed further below.



ought to be restored. Only Christie has understood the relationship which constitutes the fundament of restorative justice for what it is, namely, a relationship which is definitionally a proprietary one. The non-proprietary theories represent a regression in the theorization of restorative justice. Christie's was a major theoretical advance. It established the groundwork for the scientific analysis of restorative justice and is a necessary component of any such analysis. The theorist who seeks to proceed without Christie's insights or to jettison the proprietary fundamentals of restoration must inevitably produce an impoverished theory of restorative justice.

In truth, and despite their supposed aversion to property, the non-proprietary theories of restorative justice are themselves all profoundly, albeit clandestinely, proprietary. Here it is well to recall the dictum of Alford & Friedland to the effect that:

‘what is not treated in a work is as theoretically significant as its explicit assumptions and hypotheses. Silence carries the corollary that the expected audience will accept or be blind to the absence of treatment of certain issues as historical realities.’<sup>26</sup>

What the proprietary school makes patent, the non-proprietary school presupposes. Their penchant for ethical universals notwithstanding, non-proprietary theorists proceed from property. It is their unspoken theoretical prologue. They begin where the proprietary school leaves off. They theorize restorative justice as privatized justice without giving a second thought to the proprietary fundamentals of their cause. They are able to do so because that which is a first principle does not merit a second thought. When all is said and done, however, all theories of restorative justice, *qua* privatized justice, are genetically steeped in the ethos of property.

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26 Alford & Friedland (1985: 2).

In this connection, Christie's thesis is primordial. He seeks to comprehend precisely that which is an epistemological apriority for the non-proprietary theorist. And by doing so, he is able to pierce the veil of appearance and reveal the material core of the doctrine of restorative justice to be a proprietary one. The non-proprietary theorists all forget that justice can never be higher than right, and that right, in the final analysis, as Marx reminds us, 'can never be higher than the economic structure of society and its cultural development conditioned thereby'.<sup>27</sup> Christie does not so forget. He comprehends this fundamental materialist postulate. That is why his thesis must be given primacy over all others. His is the only thesis which attempts to make theoretically intelligible the ontological premises of restorative justice. It is this that makes him the theoretical founding father of the restorationist movement. And it is this that dictates that his theory be the cardinal object of any Marxist critique of restorative justice.

### 5.5 Pashukanis: *Law and Marxism*

The analysis and argument presented in this chapter rely heavily upon the work of Evgeny Pashukanis, the famous Bolshevik jurist, who was murdered by agents of the Stalinist regime in 1937. Pashukanis is one of a handful of Marxists to have taken law, and hence the legal form, seriously as a field of study and his

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27 Marx (1978: 531).

*Law and Marxism: A General Theory* has deservedly become a classic of Marxist jurisprudence.<sup>28</sup> No subsequent Marxist has come even close to matching the theoretical advances made by him in the materialist comprehension and critique of the legal form. Given the potency of his thesis, it is altogether surprising that Pashukanis's general theory has not become conventional Marxist wisdom in the analysis of legal relations. Yet, Pashukanis is nowadays rarely even acknowledged in the Marxist legal oeuvre, and the general theory has been

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28 *Law and Marxism* was first published in Russian in 1924. Second and third Russian editions appeared in 1926 and 1927 respectively. The third edition was also published in German in 1929. Throughout this dissertation I use the third edition, as translated from the German by Barbara Einhorn in 1978 and edited by Chris Arthur. The third edition was the last one approved by Pashukanis and appeared before he was constrained, by the victory of Stalinism and the imperatives of physical survival, to attempt various recantations in the late 1920s and early 1930s. It was also the edition which he relied upon to introduce his general theory to the world outside the Soviet Union. Finally, as Warrington (1983: 66) suggests, the third edition is a more complete work than the first and second. Not unexpectedly, the first edition generated considerable interest and controversy within legal circles in the Soviet Union. It appears to have been at the centre of a division of Bolshevik jurisprudents, most of whom were adherents of the so-called commodity exchange/form approach, into two gradations, moderate and radical. Their differences centred upon the ambit of the commodity exchange/form approach. According to Schlesinger (1946: 153-156) the moderate wing, led by Piotr Stuchka, restricted the commodity exchange approach to civil law, whereas the radical wing, led by Pashukanis, applied it to law in general. In this regard, see also Beirne & Sharlet (1979: 15-17) and Butler (2003: 74-75). Stuchka led the critique of the first Russian edition of *Law and Marxism*, to which Pashukanis (op cit 37-45) responded in a fairly lengthy preface to the second Russian edition. And although he made certain concessions to his critics (for example, he granted the existence of pre-capitalist law) he did so 'with certain reservations' (ibid 44). Pashukanis himself considers that the second edition of *Law and Marxism* preserved 'its original character in the main'. Thus, he declares (ibid 38): 'All I have done is to make those additions which were necessary, occasioned in part by suggestions made in the reviews'. The preface to the third Russian edition occupies less than a page and opens with the following observation: 'There are no substantive changes in this third edition of the work as compared with the second.' It would appear, then, that despite certain amendments of detail, Pashukanis remained faithful to his fundamental thesis throughout the three editions of *Law and Marxism* which were published with his imprimatur. That is, he continued to rely upon the homology between the legal form and the commodity form as the basis of his general theory of law. Whatever revisions Pashukanis made to his general theory were proposed in separate articles after the publication of the third edition. These modifications are usefully traced by Beirne & Sharlet (ibid: 12-14 & 20-23). For the purposes of this dissertation, then, I rely upon the third edition of *Law and Marxism* as the most comprehensive and unadulterated statement of Pashukanis's general theory.

roundly disowned by contemporary western Marxist legal analysts.<sup>29</sup>

Instead, these analysts have tended, in the main, to focus their critical efforts upon the comprehension of legal relations in terms of the base-superstructure problematic. They have been suspicious of or dissatisfied with Marx's own classification of law as a superstructural specificity and have invested considerable intellectual ingenuity into efforts to rescue legal relations from a 'mere' superstructural existence. Some of their efforts have been detailed in Chapter One above. Pashukanis has no such concerns about the place of law in the Marxist analytic. In this regard, he adheres to the classical Marxist comprehension of law. Indeed, he defines his analytical terrain as the 'legal superstructure as an objective phenomenon'.<sup>30</sup>

It needs to be remembered always that Pashukanis's project was to construct a general theory of law according to the precepts of Marxist materialism. He was not concerned to examine the workings of legal relations as an aspect of ruling-class ideology. Nor was he especially interested in the impact which law, as a superstructural phenomenon, may have upon its material base. Marxists before Pashukanis had already confronted these issues and, even if he could, he was not interested in adding to their insights. His was a quite different ambition: to produce a Marxist theory of the legal form or, at least, to identify the elements of such a theory. In other words, he was concerned to theorize law as law, that is, as a superstructural specificity, and not as a mere ideological cloak for class relations

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29 Pashukanis did enjoy authoritative status in Bolshevik Russia, but lost it under the Stalinist regime. There was also a brief revival of interest in Pashukanis in the 1970s. See Butler (1988: 32). He continued to enjoy support amongst some analysts well into the 1980s. See, for example, Melossi & Pavarini (1981), Norrie (1982), Sayer (1987) and Jakobowski (1990). However, reliance upon or reference to his general theory all but ceased in the 1990s. Today Pashukanis is well and truly *passé*. Certainly, he is no longer part of the mainstream Marxist approach to law. Some of his severest critics would consider themselves to be Marxists.

30 Pashukanis op cit 39.

of oppression and exploitation. It was a grand aspiration. And in *Law and Marxism* he succeeded, and grandly, in making the crucial theoretical breakthroughs required for the elaboration of a general theory of law.

Despite his theoretical sophistication, Pashukanis remains anathema to most jurists, including large numbers who would classify themselves as adherents of one or other variant of Marxism. The reasons for his sidelining cannot detain us here but are to be found, of course, in the deleterious impact of Stalinism upon the Bolshevik heritage and the subsequent ambiguous relationship of Western Marxism to this heritage. Like Trotsky's, Pashukanis's contribution to Marxism has never been properly recovered from the distortions and falsifications of the Stalinist degeneration, the post-1956 supposed de-Stalinization notwithstanding. What is indubitable, however, is that contemporary Marxist jurisprudence is the poorer for its shabby treatment of Pashukanis. In this connection, Balbus has made the perceptively telling observation that:

‘Almost all subsequent Marxist work on the law is, unfortunately, a regression from the standard established by Pashukanis's pioneering effort.’<sup>31</sup>

This chapter is therefore necessarily, in part, a contribution to the belated renaissance of the classical Marxist jurisprudence, of which Pashukanis is, after Marx and Engels, the most creative and truest representative.

The conventional Marxist approach to law was to identify and expose the class content of legal relations. In other words, the Marxist critique of law was about tracking the links between the constitution of the legal superstructure and the material interests of the contending classes. Marxists before Pashukanis tended to approach law as a ‘mere’ superstructural aspect of the social relations of

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31 Balbus (1978: 88).

production. They focused on the class character of the law. For the most part they comprehended law in instrumentalist and reductionist terms, that is, as a tool in the hands of the ruling class in its struggle against the ruled. For them the legal superstructure was a reflection, more or less direct, of the material interests of the dominant social classes.

Latter-day radical jurists, in response to the tenacity of such instrumentalism-reductionism, have argued for the relative autonomy of law. This approach has highlighted the ways in which legal relations are not direct reflections of ruling class interests, and how law may at times be harnessed to the cause of the dominated classes. It has also included an argument which endows law with a significant, sometimes even decisive, influence upon the constitution of the relations of production. In other words, the proponents of relative autonomy have sought to re-present the base-superstructure problematic in non-instrumentalist and anti-reductionist terms.

The conventional Marxist analysis of law in terms of the base-superstructure schema oscillates between two poles. On the one side there is instrumentalism, which denies law any autonomy from class interests. On the other side there is formalism, which grants law complete independence from such interests.<sup>32</sup> The fundamental choice is between absolute legal subservience to the relations of production and absolute legal autonomy from them. The argument for the relative autonomy of law, as described above, is a *via media*. It seeks to comprehend legal relations in terms which deny instrumentalism without promoting formalism. It is

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32 This opposition is discussed by, *inter alia*, Balbus (ibid), Collins (1984) and Tushnet (1983).

the classic position of compromise.<sup>33</sup>

For Pashukanis, there is a fundamental problem with all analyses of law - instrumentalist, formalist or relative autonomist - which adhere to the base-superstructure problematic. None of these analyses is able to comprehend the form of law. They cannot explain why legal relations take the form they do. Analyses which are located within the parameters of the base-superstructure dichotomy are unable to distinguish consistently between law, on the one hand, and sociology and politics, on the other. Legal analysis is subsumed under social analysis, and the distinctiveness of the legal form is sacrificed in pursuit of the class content or otherwise of legal relations. Even the relative autonomist project to construct a more nuanced relationship between base and superstructure is unable to supersede the definitional bounds of this relationship and engage the form of law. Like its crasser variants, it has no need of a general theory of law. Its objectives are easily and fully met by a general theory of society.

In his consideration of the question of the existence of a Marxist theory of law, Tushnet suggests, *contra* Pashukanis, that 'a Marxist theory [of law] must be sociological'.<sup>34</sup> Such an argument presumes, at least, a rough identity between the theory and sociology of law, and thereby collapses the analysis of the legal form into the sociology of law. It privileges social analysis at the expense of legal analysis, and directs us away from a materialist comprehension of the fundamental juridical concepts required for the construction of a general theory of law.

33 See Hunt (1993: 166): 'Between the Scylla of autonomy and the Charybdis of determinism lies the haven of relative autonomy.' Balbus (*ibid* 75) has a different view of the relative autonomy of law. For him, it is not a position of compromise between formalism and instrumentalism. Instead, it 'purports to transcend the opposition between these positions by rejecting the common conceptual terrain on which they are based and elaborating a wholly different theoretical terrain'. He goes on to construct a theory of law which is essentially Pashukanian. Unsurprisingly, Balbus's approach is not the conventional argument for relative autonomy.

34 Tushnet *op cit* 172.

Tushnet's position also entails the rejection of 'large abstractions such as "bourgeois law"' as the subject matter of a Marxist theory of law.<sup>35</sup> He considers the law of a determinate social formation at a specific historical juncture to be the legitimate subject matter of a Marxist theory of law. However, such a proposition fails to appreciate that a general theory of law cannot be derived from anything but 'large abstractions'. For such a theory, the large abstraction of bourgeois law is a genetic imperative. Law is a product of social evolution and is an attribute of all social formations which have developed class divisions. However, mature law is bourgeois law, that is, the law of the bourgeoisie as the ruling class. Bourgeois law is, in this regard, the high-water mark of legal evolution. It is the culmination of law as form. Only in bourgeois society does the juridical outlook triumph completely. Only in bourgeois society are the social relations of production articulated in legal terms. Only in bourgeois society are human relations fully structured according to the principle of legal subjectivity.<sup>36</sup> The 'large abstraction' of bourgeois law is thus the natural and necessary object of a Marxist general theory of law. And such a theory cannot be simply or even mainly sociological. Its primary concern must be to comprehend the constitution of the legal form.

Pashukanis was, of course, critical of those Marxist theories in which 'the concept of law is examined exclusively from the point of view of its content'.<sup>37</sup> These, he complained, were nothing more than bourgeois sociological theories of law into which the 'element of class struggle' has been injected.<sup>38</sup> They were not properly juridical, and whatever juridical concepts they did engage were treated as obfuscations which had to be decoded in order to uncover their class content. The concepts themselves did not merit any sustained theoretical

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35 Ibid 182.

36 See Pashukanis op cit 40-45.

37 Ibid 54.

38 Ibid 53.



attention. Pashukanis considered this approach to be fatal to the construction of a general theory of law. For him the Marxist analysis of law had to comprehend legal relations for themselves, and not merely as the receptacle of class interests. This necessarily implied a focus upon law as form. In other words, the key to the construction of a Marxist theory of law lay in a 'materialist interpretation of legal regulation as a specific historical form'.<sup>39</sup>

Needless to say, Pashukanis accepted the traditional Marxist position that the legal form conceals a content which is structured by the inequities of the capital-labour relation. And he granted the importance of exposing the class or economic content of legal relations. But he was adamant that the proper object of Marxist jurisprudence had to be the legal form and its associated juridical concepts. Thus, he warns:

'If, however, we forgo an analysis of the fundamental juridical concepts, all we get is a theory which explains the emergence of legal regulation from the material needs of society, and thus provides an explanation of the fact that legal norms conform to the material interests of particular social classes. Yet, legal regulation has still not been analysed as a form.'<sup>40</sup>

Most Marxists have surrendered to the impulse to dismiss the form of law as an obfuscation and, relying upon the analytical resources of Marxist political economy, have sought to lay bare the relations of domination and exploitation which constitute the content of the legal relation. Pashukanis departs radically from this conventional Marxist wisdom. He realized that the customary focus upon the content of the legal relation was the source of the poverty of Marxist legal theory. He perceived that the traditional Marxist aversion to analysis of the legal form was the major obstacle to the construction of a general theory of law. Thus he set himself the task of elaborating such a theory on the basis of a

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39 Ibid 54.

40 Ibid 55.

materialist analysis of the legal form. The result was the so-called commodity form theory of law.<sup>41</sup>

Pashukanis's central thesis is disarmingly straightforward, namely, that the historical origins of law as we understand it are to be found in the process of commodification.<sup>42</sup> In other words, law is an attribute of the commodity economy, that is, the economy in which the *raison d'être* of production is exchange. The natural economy, in which production is for use by the producers, does not need law. For as long as the products of human labour remain primarily use values, custom is an adequate regulator of social relations. The appearance of the legal form on the historical stage is coterminous with the transformation of the products of human labour into commodities. The world-historic transition from production for use to production for exchange is simultaneously the world-historic transition from custom to law. The genesis of the legal form is thus to be located in the genesis of the commodity form. Commodification spawns legality; the commodity form is the harbinger of the legal form. Pashukanis reminds us that it was Marx himself who unveiled 'the deep interconnection between the legal form and the commodity form'.<sup>43</sup> Hence his methodological dictum:

'The critique of bourgeois jurisprudence from the standpoint of scientific socialism must follow the example of Marx's critique of bourgeois political economy.'<sup>44</sup>

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41 See Warrington op cit and Fine (1984). The theory is also sometimes referred to as the commodity exchange theory of law. See Fuller (1949) and Norrie (1882). Pashukanis himself did not name his theory. He was constructing a general theory of law. His *Law and Marxism* is exemplary of the theoretical advances and analytical sophistication achieved by the Bolsheviks under the leadership of Lenin and Trotsky. Interestingly, Pashukanis's objections to proletarian law echo Trotsky's denial of the possibility of proletarian culture.

42 This is the process whereby the products of human labour are transformed into commodities, that is, exchange values. Commodification begins in the pre-capitalist epoch but becomes generalized under capitalism, when labour-power itself is transformed into a commodity.

43 Pashukanis op cit 63.

44 Ibid 64.

He considered *Law and Marxism* to be an extrapolation of the elements of the Marxist theory of law developed in *Capital*, *Anti-Dühring* and other Marxist classics.<sup>45</sup>

The relationship between law and the commodity is a necessary one. Since exchange is its logical conclusion, commodification entails the market. In other words, production for exchange requires the emergence of the conditions for exchange, that is, market relations. These must be or must at least appear to be human relations. Only human beings are capable of triggering the exchange process. The market in commodities must therefore necessarily operate as one staffed and directed by human beings. Marx explains the matter in more detail thus:

‘It is plain that commodities cannot go to market and make exchanges of their own account. We must, therefore, have recourse to their guardians, who are also their owners ... In order that these objects may enter into relation with each other as commodities, their guardians must place themselves in relation to one another, as persons whose will resides in these objects, and must behave in such a way that each does not appropriate the commodity of the other, and part with his own, except by means of an act done by mutual consent. They must therefore recognise in each other the rights of private proprietors. This juridical relation ... is but the reflex of the real economic relation between the two. It is this economic relation that determines the subject-matter comprised in each such juridical act.’<sup>46</sup>

The market requires perfect equality, not only amongst commodities but also amongst their owners.

Commodity equality is obviously necessary and is achieved in the calculation of exchange value in terms of the socially necessary labour time required to produce the commodities. The equality of commodity owners (who

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45 Ibid 38.

46 Marx (1954: 88).

are naturally unequally endowed with talents, potentialities and the like) is necessary to ensure that the process is indeed one of exchange and not of appropriation or robbery. Marx again:

‘Although individual A feels a need for the commodity of individual B, he does not appropriate by force, nor vice versa, but rather they recognize one another reciprocally as proprietors, as persons whose will penetrates their commodities. Accordingly, the juridical moment of the Person enters here ... No one seizes hold of another’s property by force. Each divests himself of his property voluntarily.’<sup>47</sup>

There can be no market in commodities unless each and every owner recognizes and accepts each and every other owner as an equal. Owner equality is a necessary concomitant of commodity equality. Both are demanded by the market in commodities.

Owner equality is achieved legally. The aboriginal legal transaction is the invention of the legal subject. The transition from custom to law is exemplified in the concept of legal subjectivity. The legal subject is the disembodied commodity owner, disembodied, that is, of all natural advantage or disadvantage. According to Pashukanis:

‘At the same time, therefore, that the product of labour becomes a commodity and a bearer of value, man acquires the capacity to be a legal subject and a bearer of rights.’<sup>48</sup>

In other words, commodification and juridification are parallel historical processes. The commodity owner enters and participates in the market as a legal subject, perfectly equal, in terms of rights and duties, to every other commodity owner.

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47 Marx (1973: 243).

48 Pashukanis op cit 112.

It is the rise of the notion of legal subjectivity which abolishes the natural inequality of people.<sup>49</sup> Every legal subject is deemed to be exactly equal to every other legal subject. Such equality, as intimated above, is a necessary attribute of the market. It is the guarantor of the exchange relation and hence of the reproduction of the commodity economy. It, in its turn, is guaranteed by the state, which possesses the capacity to enforce the law. As Harvey notes, the juridical moment:

‘supposes not only a solid legal foundation to exchange but also the power to sustain private property rights and enforce contracts. This power, of course, resides in “the state”. The state in some form or another is a necessary precondition to the establishment of values.’<sup>50</sup>

Pashukanis, similarly, discerns a definite historical interrelation between the development of the commodity economy and the development of ‘bourgeois statedom’, which, he tells us:

‘can be traced to a single principle, according to which neither of two people exchanging in the market can regulate the exchange relation unilaterally; rather this requires a third party who personifies the reciprocal guarantees which the owners of commodities mutually agree to as proprietors, and hence promulgates the regulations governing transactions between commodity owners.’<sup>51</sup>

The legal subject who asserts or attempts to assert himself as superior to his fellows and not to respect their right to equality usually has to answer (or be made to appear to answer) for his opportunism to the law enforcement agencies of the state.

49 Formally, it also abolishes social inequality. Of course, in practice the legal subjectivity of a peasant or proletarian is seldom of consequence against the social power of the ruling elite. For, as Pashukanis (*ibid* 127) reminds us, ‘the capacity to be a legal subject is a purely formal capacity’.

50 Harvey (1982: 18-19).

51 See Pashukanis *op cit* 148-150. The class nature of the capitalist state is never far from his mind. Thus he adds almost immediately that ‘the bourgeoisie has never, in favour of purity of theory, lost sight of the fact that class society is not only a market where autonomous owners of commodities meet, but is at the same time the battlefield of a bitter class war, where the machinery of state represents a very powerful weapon’.

Law, thus, is the ethos of the market generalized to human relations. The idea that, regardless of our *de facto* natural and socio-economic differences, we are all equal before the law has its origins in the equality which forms the bedrock of all market relations. The idea that we all have certain inalienable rights which are enforceable against all comers is derived historically from the rights of the commodity owner. The commodity economy is the *fons et origo* of the concept of legal equality. It is the logic of this economy which produces the legal relation. Pashukanis puts it thus:

‘The legal relation between subjects is simply the reverse side of the relation between products of labour which have become commodities.’<sup>52</sup>

The birth of law is structured by the transition from the natural to the commodity economy. Our notion of equality is a fundamentally legal one, and it derives from our transformation into legal subjects. We had to acquire legal subjectivity, and hence legal equality, in order to become successful commodity owners, that is, in order to warrant the integrity of the market. The juridical worldview rests upon the idea of equality. Concepts and interactions which do not embrace equality have to be comprehended as non-juridical. Exchange is the fundamental juridical relation. It is the hallmark of the commodity economy. And it is the source of the transformation of every natural person into a juridical person.<sup>53</sup>

Such are the essentialia of the general theory of law constructed by Pashukanis. It is a theory which, despite the objections of detractors, is founded surely and consistently upon the precepts of classical Marxism. Pashukanis undertook to do what Marx himself had never had the opportunity to produce, namely, a Marxist general theory of law. He made use of the episodic remarks on the critique of the legal relation left by Marx and Engels to fashion a Marxist

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52 Ibid 85.

53 Marx op cit 246. See also Harvey op cit 18-19.

theory of law that is derived directly from the Marxist theory of value. *Law and Marxism* is to the critique of legal relations what *Capital* is to the critique of economic relations.

The crucial elements of Pashukanis's theory may be summarized in the following terms:

- The subject-matter of a general theory of law is the legal form, that is, the legal superstructure constituted in terms of the fundamental juridical concept of legal subjectivity.<sup>54</sup> The emergence of the legal subject expresses the historic transformation of human relations into legal relations.<sup>55</sup>
- The genesis of the legal form, and hence of the legal subject, is to be found in the relations of exchange which accompanied the rise of commodity production.<sup>56</sup> The natural economy is a pre-juridical era of human social evolution. The juridical era commences with petty commodity production and summates in generalized commodity production, that is, capitalism.
- The legal form is the homologue of the commodity form. The legal subject is the cell-form of legal relations in the same way as the commodity is the cell-form of economic relations.<sup>57</sup> The analysis of the legal form must therefore proceed from the analysis of the commodity form.<sup>58</sup>
- The legal subject is a commodity owner and vice versa. They coalesce in the process of exchange. The circulation of commodities could not occur without every commodity owner becoming also a legal subject, for it is only as a legal subject that the commodity owner could make his products available for exchange in the market. In other words, the birth and development of commodity exchange

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54 Pashukanis op cit 47.

55 Ibid 40.

56 Ibid 43.

57 Ibid 111-113.

58 Ibid 111.

entailed the birth and development of the legal subject.<sup>59</sup>

- The phenomenon of law, then, arises in tandem with the economic category of value.<sup>60</sup> Legal relations are, in this connection, the form in which exchange relations materialize. The legal subject is the quotidian purveyor of the spirit of the commodity. The core legal principle of equality is the law of value juridified.<sup>61</sup> The general theory of law must therefore be concerned, first and foremost, with mapping the interconnections between the legal form and the commodity form.

The theory of law developed by Pashukanis has every claim to be regarded as *the* Marxist theory of law. It was Marx and Engels who developed the materialist conception of history upon which Pashukanis's theory is so meticulously based. It was Marx and Engels who made the analytical distinction between base and superstructure which led Pashukanis to the conclusion that the form of law should be the object of the Marxist theory of law. It was Engels who taught us that the bourgeois world outlook is fundamentally a juridical one. It was Marx who showed us that legal subjectivity and its accompanying ethos of equality are necessary properties of the market in commodities.<sup>62</sup> Pashukanis himself was clear about the aetiology of his work. Thus, he tells us:

‘In Marx, the analysis of the form of the subject follows directly from the analysis of the commodity form.’<sup>63</sup>

He knew that he was simply developing and synthesizing the real discoveries made by Marx and Engels. He was able to elaborate the so-called commodity

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59 Ibid 112-113.

60 Ibid 117.

61 Ibid 38.

62 Ibid 111.

63 Ibid.



exchange theory of law only because Marx and Engels had long ago provided all the signposts required for such an elaboration.<sup>64</sup>

## 5.6 In Defence of Pashukanis

Despite his rather weighty Marxist credentials, criticism of Pashukanis is widespread, not least amongst analysts who would consider themselves Marxist. There are four objections to the general theory of law which stand out for being repeated by various critics. They are, firstly, that the theory is too formal and hence too abstract; secondly, that it is methodologically incorrect to theorize law, as Pashukanis does, in terms of the relations of commodity exchange (instead of commodity production); thirdly, that the theory incorrectly comprehends law as a specifically capitalist phenomenon; and fourthly, that the theory encouraged a form of legal anarchism which provided a favourable milieu for the rise of Stalinism.

### 5.6.1 Essential versus Non-essential

The first charge was levelled against *Law and Marxism* as early as 1930 by Karl Korsch, who complained of the 'extraordinarily abstract nature of this work' which, he adds, 'in parts intensifies to become downright scholasticism'.<sup>65</sup> Fine concludes that 'the real problem ... in Pashukanis's intervention lay in its abstractness'.<sup>66</sup> And Young has adjudged that his 'emphasis upon the form of law

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64 Löwy (1981: 8) says of the scattered comments by Marx and Engels on the theory of permanent revolution that 'it is not possible to speak of a coherent and systematic theory of permanent revolution in Marx and Engels. Rather, there is a series of fragmentary conceptions, prophetic intuitions and inchoate perspectives, which intermittently appear and reappear but are never ordered in a rigorous doctrine or global strategy. Their importance is above all methodological.' Virtually the same may be said of Marx and Engels on the general theory of law. And in the same way as it was left to Trotsky to fashion their remarks into the theory of permanent revolution, so it was given to Pashukanis to produce the general theory of law.

65 Korsch (1978: 193-194).

66 Fine op cit 163.

and punishment produces ... a strangely abstract explanation'.<sup>67</sup> The alleged divorce between Pashukanis's theory and reality has prompted Hirst to label his concept of law idealist,<sup>68</sup> Warrington to liken his theoretical propositions to 'wild flights of fancy',<sup>69</sup> and Hunt to allege the correspondence between the commodity form and punishment to be 'nothing more than the verbal equation achieved by the dual usage of equivalence and the assertion that the verbal correspondence evidences a real correspondence'.<sup>70</sup> Even the sympathetic Sayer, who credits Pashukanis with developing Marx's insights into the legal form 'with considerable brilliance', feels constrained to refer to his 'at times, undue abstractness'.<sup>71</sup>

It is submitted that, despite its popularity, the accusation of abstractness against Pashukanis is misplaced. It derives from a shared misunderstanding amongst the critics of the role of abstraction in the Marxist method. Marx taught us that:

'In the analysis of economic forms ... neither microscopes nor chemical reagents are of use. The force of abstraction must replace both.'<sup>72</sup>

This same has to be true also of the analysis of the legal form. The only instrument available for the construction of a general theory of law is the force of abstraction. The process of abstraction is crucially about the separation of the essential from the non-essential. Hegel, from whom Marx learned the dialectic, understood that scientific comprehension requires that 'the essential be distinguished and brought into relief in contrast with the so-called non-essential'.<sup>73</sup> The analyst must be able to get to the heart of the matter, so to speak.

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67 Young (1980: 116).

68 Hirst (1979: 111).

69 Warrington op cit 64.

70 Hunt op cit 81.

71 Sayer op cit 108.

72 Marx (1954: 19).

73 Hegel (1956: 65).

And, in analytical terms, the heart is to be found, not in the body, but in the cells comprising that body.<sup>74</sup> In other words, the analysis of a social form such as law must be located at the cellular level. This level cannot be reached other than by a process of systematic abstraction from those properties of the form which constitute it above the cellular level.

Marx perceived the commodity to be ‘the economic cell-form’<sup>75</sup> of the capitalist mode of production and devoted the bulk of the first volume of *Capital* to its analysis, at the expense of such ‘non-cellular’ economic aspects as price, profit, rent, business cycles, crises, and the like. A general theory of law must, similarly, discard all that is secondary and include in its ambit only those relations which are constitutive of the legal form. Pashukanis understood this. Not only does he expressly refer to Marx’s statement cited above, but he extends it to the analysis of the legal form:

‘The theory of law makes use of abstractions which are no less ‘artificial’ [than those used by Marx in the analysis of economic forms]: the research methods of natural science cannot discover a ‘legal relation’, or a ‘legal subject’ either, yet behind these abstractions too lie perfectly real social forces.’<sup>76</sup>

Pashukanis knew that in order for him to generate a general theory of law he had to isolate the fundamental juridical concepts from the myriad of legal rules and regulations. He understood that a general theory of law had to comprehend the purified legal form, unencumbered by the diversions of ‘law in practice’ or ‘law in society’.<sup>77</sup>

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74 Marx op cit 19.

75 Ibid.

76 Pashukanis op cit 59.

77 See Sweezy (1942: 19).

The general theory of law constructed by Pashukanis is abstract only in the sense that, in terms of the Marxist method, it is located at a high level of abstraction. The avowed Marxist critics who charge abstractness do not appear to comprehend this most basic of Marxist methodological tenets. They misunderstand both the purpose and process of abstraction. They confuse the identification, for analysis, of an unadulterated aspect of social reality with an alleged escape from that reality. Sweezy sets the record straight in this regard:

‘The legitimate purpose of abstraction in social science is never to get away from the real world but rather to isolate certain aspects of the real world for intensive investigation. When, therefore, we say that we are operating on a high level of abstraction we mean we are dealing with a relatively small number of aspects of reality; we emphatically do not mean that those aspects with which we are dealing are not capable of historical investigation and factual illustration.’<sup>78</sup>

Pashukanis’s general theory of law operates at such a high level of abstraction. In order to analyse it, he had to engage the legal form as a pristine insularity. He had to make a number of simplifying assumptions which reduced the legal relation to its ‘purest form’ and ‘free of all unrelated disturbances’.<sup>79</sup>

This meant downplaying the social aspects of law and de-emphasizing its class content in favour of an analytical focus upon:

‘the development of the most fundamental and abstract juridical concepts, such as ‘legal norm’, legal relations’, ‘legal subject’ and so on’.<sup>80</sup>

These are the abstractions Pashukanis required for the construction of his general theory of law. They are the abstractions with which he was able to separate the essential from the non-essential, and to subject the essential relations of the legal

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78 Ibid 18.

79 Ibid 17 & 20.

80 Pashukanis op cit 47. When he refers to these juridical concepts as fundamental and abstract, he is identifying them as the concepts which have been identified, using the force of abstraction, as those which will provide insight into the purified legal form.

form to the rigorous analysis from which the general theory could emerge. As a general theory it is necessarily situated at a high level of abstraction. But it is by no means an abstract theory, in the sense that it is divorced from the real world of the legal form. In point of fact, it is the only theory of law which has been able to provide a scientific link between the legal form and the capital relation, and which thereby comes closest to comprehending that world, in historical materialist terms, for the bourgeois world that it really is.

The allegation of abstractness therefore does not withstand scrutiny and must be rejected. Pashukanis sought to theorize law as form, and to do so from a materialist perspective. The use of the force of abstraction led him to identify a number of juridical concepts as fundamental, with the concept of the legal subject being primary amongst these. His interrogation of this concept led him to uncover a correspondence between the legal subject and the commodity, Marx's fundamental economic abstraction. Despite the fact that it operates at a high level of abstraction, the relationship between the commodity form and the legal form is a very real one. The legal form is derived directly from the commodity form. This relationship is not apparent at a lower level of abstraction, such as the class content of the law. It becomes evident only at the high level on which Pashukanis's theory operates.

Every property of the legal relation which does not contribute to the comprehension of the legal cell-form must be regarded as non-essential and must therefore be excluded from the elements of a general theory of law. This is what Pashukanis did. And he was able thereby to achieve the analytical coup which illuminated the real genesis of the legal form and which formed the basis of his elaboration of the general theory of law. Those who decry the theory as being too abstract or too formal or too fanciful appear not to appreciate the role of the force of abstraction in the construction of theoretical paradigms. They appear, also, to

be requiring that, in order to avoid the charge of abstractness, the elaboration of a theory be an activity informed by the articles of empiricism and the methods of positivism. Such a requirement, of course, violates every epistemological postulate of Marxism and cannot be taken seriously as a supposed deficiency of Pashukanis's general theory.

It is not possible to construct a theory of any aspect of social reality without resorting to abstraction. Every theorist, whether Marxist or not, must rely upon the force of abstraction to make sense of the relation being analysed. We are never able to comprehend any social phenomenon in its full complexity, and must necessarily dismantle it in order to be able to think about it in a way which will allow us conceptually to approximate its reality. If we do not do so, that is, if we do not separate essential from non-essential aspects by abstraction and focus our analytical attention upon the essentials, the relation which we seek to comprehend will forever remain beyond our ken. Abstraction is, in a word, a universal theoretical injunction.<sup>81</sup> Pashukanis understood this and produced a theory of law which, because it is a general theory, is necessarily located at a high level of abstraction. It is his reliance upon the force of abstraction which explains the alleged abstractness of the general theory.

Critics who expect him to be less abstract are, in reality, demanding that the theory operate at a significantly lower level of abstraction. They forget, of course, that a general theory requires law to be abstracted at the level of generality of,

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81 See Ollman (1993: 24-27). It bears noting here that process followed earlier in this chapter, according to which partial restorative justice was rejected as an object of analysis and the proprietary theory was identified as primordial for the analysis of comprehensive restorative justice, was such an exercise in abstraction. It was an attempt to segregate those aspects of the theory of restorative which are essential for critical assessment from those which are incidental. The proprietary theory emerged as essential from this process. But the process of abstraction also led to the non-proprietary theories being classified as non-essential, and it was concluded that they could not make any substantive contribution to the comprehension of comprehensive restorative justice.

firstly and primarily, the capitalist mode of production; and thereafter the abstractions of class society and of human society have to be given their epistemological due.<sup>82</sup> Features such as specific laws or even the law of a given social formation in the capitalist epoch need to be shifted out of focus in order to bring into focus the anatomy of the legal form itself. In other words, the key to the comprehension of the legal form is to be found outside the operations of the legal system; rather, it is to be found in the relationship between the fundamental juridical concepts and the fundamental concepts of political economy. The charge of abstractness is, in this context, a nonsense.

It is also disingenuous. It is the kind of charge which the accused can never rebut. For the criterion of abstractness is always a subjective one, chosen by the accuser. And it is the accuser who decides, ultimately, whether any attempt by the accused at concretization has been successful.<sup>83</sup> It is the classic fall-back allegation, made by the critic who has had little or no success in his efforts to invalidate the core propositions of his object of criticism.<sup>84</sup> Such a critic usually has been bested theoretically and attempts to avoid capitulation with the cynical charge of abstractness.<sup>85</sup> Disingenuous allegations deserve only to be dismissed for the fabrications that they are. Certainly, the charge of abstractness is of no moment in relation to Pashukanis's general theory of law.

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82 Ollman (ibid 55-58) identifies seven levels of generality in the process of abstraction. Marx's abstractions are primarily at level 3, focusing on the peculiarities of capitalist society. Class and human society are level 4 and level 5 abstractions respectively. Level 1 and level 2 concern the individual, while level 6 and level 7 deal with the animal and natural worlds.

83 The charge of abstractness also takes no account of the difference between mode of investigation and mode of exposition in theoretical work. The former is usually an intensely empirical and intensively concrete exercise upon which the latter is based. The allegation that theory is abstract cannot be sustained on the strength of the apparent features of the mode of exposition.

84 See Sparkes (1991: 17).

85 It is a charge of the same order as labelling a troublesome opponent fascist or communist or bourgeois or even racist because one cannot sustain a substantive argument against that opponent.

### 5.6.2 Exchange versus Production

The second recurrent criticism of Pashukanis is that, contrary to the Marxist method, he has derived his general theory of law from exchange. It is an argument which is compressed in the idea that Pashukanis's is a commodity exchange theory of law.<sup>86</sup> The critical consensus appears to be that, in order to qualify as Marxist, the theory of law must be rooted in production, not exchange. Despite differences in detail, most left critics posit that the Marxist theory of law should be informed by the relations of commodity production and not, as Pashukanis believes, the relations of commodity circulation. For them, law as a superstructural effectivity, has to be theorized in terms of its relationship to the process of commodity production. They claim that this was Marx's method and ought to have been Pashukanis's. His detractors are not reluctant to condemn him as unMarxist for this alleged deviation from the received canons of Marxism.<sup>87</sup>

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86 The origin of this nomenclature is uncertain. It was neither chosen nor used by Pashukanis. See Norrie op cit 431.

87 This criticism of Pashukanis is derived from a larger charge of economism against him. In other words, it is a criticism which is rooted in the allegation that his general theory is the product of an economic reductionism purporting to explain legal relations as epiphenomena of the economic base. The charge of economism was made by Stuchka (cited in Beirne & Sharlet op cit 16) as early as 1927 when he attacked Pashukanis's theory for 'its one-sidedness insofar as it reduced all law to only the market, to only exchange as the instrumentalization of the relations of commodity producers'. Subsequently, Kelsen (1955: 89 & 93) has accused Pashukanis of 'reducing, in the field of jurisprudence, legal phenomena to economic phenomena'. Collins (op cit 23 & 109) has concluded that Pashukanis subscribed to an economism which resulted in his producing a 'crude materialist explanation of the content of law'. Davis (1988a: 70-71), too, has registered a strong objection to the alleged 'economism of Pashukanis' and Sumner (1979: 252-253) has adjudged Pashukanis's work to be 'a classic example of economism in Marxist theory of law'.

It is submitted that there is nothing economic about Pashukanis's general theory. He did not reduce the juridical to the economic, nor did he seek to derive legal changes directly or exclusively from economic changes. His concern was to produce a Marxist theory of law. His theoretical endeavours were, of course, informed by the materialism of classical Marxism (See Chapter 1 above). However, they had nothing whatsoever in common with any crude materialism which engenders economic reductionism. The charge of economism betrays a crucial misunderstanding of Pashukanis's method. He was not interested in theorizing the content of law or of comprehending legal relations in terms of the class struggle. Indeed, for him, it was precisely these concerns which, till then, had diverted the development of the Marxist theory of law away from a necessary and proper focus upon the legal form. Such a focus, Pashukanis understood, would have to be located at a level of abstraction high enough to bring into unadulterated relief the relation between the economic and legal cell-forms. To be sure, there is a one-sidedness here, but only in the sense of a



Again, one of the earliest assaults along these lines came from Korsch who, in his 1930 review of *Law and Marxism*, highlighted Pashukanis's 'extremely strange - for a "Marxist" - overestimation of "circulation"'.<sup>88</sup> Young's suggestion that Pashukanis's approach entails a 'deviation from the commonly accepted notions of the relationship between law and economy'<sup>89</sup> falls squarely within the purview of this line of criticism. Lloyd & Freeman join the chorus of critics with the allegation that 'Pashukanis's theory concentrates on the exchange of commodities, as if this were all capitalism was about'.<sup>90</sup> Warrington identifies the 'dominance of exchange' as one of his objections to Pashukanis, and submits that he 'appears to have written production out of the law'.<sup>91</sup> He continues:

'Pashukanis has failed to make the logical allowances necessary for the importance of the production process itself in the development of a social system. Legal theories which attempt to base themselves on "social reality", as Pashukanis claimed, must incorporate the production process into their legal analysis or make sufficient allowances for its importance in relation to the legal system as a whole. Pashukanis's theory is based on a society of commodity production, yet almost eliminates the process of production from history.'<sup>92</sup>

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methodological imperative required to lay bare the materialist sources of the legal form. Certainly, that is not the same as positing a relation of slavish operational dependence of law upon economy. Pashukanis did not reduce law to the market. Instead, he extrapolated Marx and Engel's discovery that the legal form has its genesis in the market into a general theory of law.

The speciousness of the charge of economism is acknowledged even by Fine (op cit 163), one of Pashukanis's more vocal critics, in the following extract: 'Pashukanis traced the logic of the connection between commodity exchange and legal regulation, and on this basis argued for the twofold nature of the transition to communism: it was to be both an economic process involving the replacement of market relations by planned production and distribution, and a juridic process involving the replacement of legal regulation by what Pashukanis called "technical" forms of regulation. In this respect the charge that Pashukanis was "economistic" is not strong, since he conceived of the transition as comprising not only a transformation of economic relations but also a self-conscious and planned transformation of authority relations.'

88 Korsch op cit 195.

89 Young op cit 117.

90 Lloyd & Freeman (1985: 989).

91 Warrington op cit 53.

92 Ibid 53.

The idea that this concern with exchange constitutes an unMarxist deviation is pressed home by Fine, who tells us that:

‘Whereas Marx derived law from relations of commodity production, Pashukanis derived it from commodity exchange. This was the essence of their difference.’<sup>93</sup>

He concludes that Pashukanis in effect aligned himself with the methods of bourgeois jurisprudence when he abstracted exchange from the relations of production. The result was an approach to law which had ‘an entirely different coloration from that of Marx’s’.<sup>94</sup> Collins opines that:

‘Pashukanis indulged in all the vices of reductionism, that is, he purported to explain all legal rules as reflections of commodity exchange’.<sup>95</sup>

Stone concurs with this assessment, and accuses Pashukanis of being ‘crudely reductionist’.<sup>96</sup>

Generally, the critics agree that Pashukanis has misread Marx on the question of exchange and production relations<sup>97</sup> and that his focus upon exchange is an index of considerable theoretical confusion.<sup>98</sup> The argument has been potent enough to prompt even Norrie, who is a staunch supporter of Pashukanis against the criticisms of Warrington especially, to express a measure of concern about the apparent dominance of exchange:

‘It must be conceded that Pashukanis does concentrate on the relationship between exchange and law in the *General Theory*.’<sup>99</sup>

It is submitted that this kind of concession is quite unnecessary and gives the

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93 Fine op cit 157.

94 Ibid 159.

95 Collins op cit 109.

96 Stone (1985: 45).

97 See Warrington op cit 57-58.

98 See Fine op cit 158.

99 Norrie op cit 426.

criticism much more credence than it deserves. For, as will be shown below, the claims that Pashukanis misunderstands Marx and is theoretically confused are petty, and prove only that the critics misunderstand both Marx and Pashukanis.

Marx (in the *Preface*) taught us that property relations are the legal expression of the relations of production. In other words, he held that there was an especially close relationship between the economic base and the legal superstructure. A fuller discussion of the meaning of Marx's statement is to be found in Chapter One above.<sup>100</sup> However, Marx did *not* hold that law is to be (or even can be) derived directly from the process of production. He did *not* say that the genesis of the legal form is to be found in the production of commodities, as Pashukanis's critics would apparently have us believe. He spoke, it will be recalled, of the totality of the social relations of production constituting the economic base upon which arises the superstructure. As a superstructural effectivity, law is obviously to be derived from the relations of production. But the relations of production are not coterminous with the process of production. Nowhere does Marx even hint at such an equivalence. In other words, nowhere is there any suggestion that the legal form is an expression of or arises from the process of production. The totality of relations of production obviously and necessarily encompasses the process of production. But it also incorporates the process of circulation or exchange, just as obviously and necessarily. In the capitalist mode of production, by the totality of the social relations of production is meant, therefore, the articulation of commodity production and commodity exchange.

The point is that the *Preface* does not admit of the conclusion that, for Marx, the origins of the legal form are to be sought in the process of production. Nor, it should be observed, does the *Preface* imply that the genesis of the legal

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100 See also Jakubowski op cit 46-50.

form is not to be found in the process of circulation. Marx's 'guiding principle' does not, in this connection, specify the relationship between the components of the relations of production. There is, in other words, nothing in the *Preface* on which the critics may rely to press home the accusation that Pashukanis is mistaken to privilege the circulation component or that he is wrong to derive the legal form from the process of commodity exchange. This criticism that Pashukanis illegitimately elevates exchange above production is presented as a materialist argument from Marxist first principles. However, these principles do not include the invariable primacy of production over exchange. And, by extension, they do not exclude the possibility that, in certain circumstances and for certain purposes, exchange may well be prior to production.

The *Preface* does not engage the legal form analytically. It is useful for situating law in general as a superstructural element, and to comprehend its relation to the production process in general. But it does not provide significant insight into the constitution of the legal form. For this we need to look to works such as the *Grundrisse* and *Capital*, where Marx does delineate the materialist rudiments of the general theory of law. The most striking feature of Marx's juridical ruminations is the frequency and consistency of the thesis that, of the totality of the relations of production, it is the relations of exchange which provide the material source of the legal form. The extracts from *Capital* and the *Grundrisse* cited earlier in this chapter typify Marx's approach to the legal form. Selected further extracts exemplifying this approach are given below:

'The exchange of commodities of itself implies no other relations of dependence than those which result from its own nature. On this assumption, labour-power can appear upon the market as a commodity, only if, and so far as, its possessor, the individual whose labour-power it is, offers it for sale, or sells it, as a commodity. In order that he may be able to do this, he must have it at his disposal, must be the untrammelled owner of his capacity to labour, i.e., of his

person. He and the owner of money meet in the market, and deal with each other as on the basis of equal rights, with this difference alone, that one is buyer, the other seller; both, therefore, equal in the eyes of the law.’<sup>101</sup>

‘This sphere [of exchange] is in fact a very Eden of the innate rights of man. There alone rule Freedom, Equality, Property and Bentham. Freedom, because both buyer and seller of a commodity, say of labour-power, are constrained only by their own free will. They contract as free agents, and the agreement they come to, is but the form in which they give legal expression to their common will. Equality, because each enters into relation with the other, as with a simple owner of commodities, and they exchange equivalent for equivalent. Property, because each disposes only of what is his own. And Bentham, because each looks only to himself.’<sup>102</sup>

[W]hen the economic form, exchange, posits the all-sided equality of its subjects, then the content, the individual as well as the objective material which drives towards the exchange, is freedom. Equality and freedom are thus not only respected in exchange based on exchange values but, also, the exchange of exchange values is the productive, real basis of all equality and freedom.’<sup>103</sup>

‘In Roman law, the *servus* is therefore correctly defined as one who may not enter into exchange for the purpose of acquiring anything for himself. It is, consequently, equally clear that although this legal system corresponds to a social state in which exchange was by no means developed, nevertheless, in so far as it was developed in a limited sphere, it was able to develop the *attributes of the juridical person, precisely of the individual engaged in exchange*, and thus anticipate the legal relations of industrial society, and in particular the right which rising bourgeois society had necessarily to assert against medieval society.’<sup>104</sup>

Marx may not have written a major treatise on law. But whenever, in his economic and political writings, he devotes any serious analytical attention to the specificity of the legal form he locates it squarely within the compass of exchange relations. His scattered theses on the legal form all reduce to the single

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101 Marx (1954: 165).

102 Ibid 172.

103 Marx (1973: 245).

104 Ibid 245-246, original emphasis.

proposition that law takes the form it does because it is an expression of the exchange relations of the relations of production. This is made crystal clear in the last extract cited above, in which Marx, literally and emphatically, equates the ‘juridical person’ with ‘the individual engaged in exchange’.

Engels’s legal writings reproduce Marx’s position. In this regard, it must be recalled that Pashukanis himself cites Engels’s submissions on the legal form contained in *Anti-Dühring* as a source of the general theory. He relies specifically on chapter titled *Morality and Law. Equality* and explains that:

‘In it, Engels gives an absolutely precise formulation of the link between the principle of equality and the law of value, with the footnote that “this derivation of the modern idea of equality from the economic condition of bourgeois society was first expounded by Marx in *Capital*”.’<sup>105</sup>

Even a casual reading of the cited chapter readily confirms Pashukanis’s assessment of it. For Engels, the bourgeoisie subscribed to a world view which was legal in its essentials.<sup>106</sup> As a class, the bourgeoisie was composed of ‘producers of, and traders in, commodities’.<sup>107</sup> They understood that the ‘exchange of commodities on the level of society and in its fully developed form’ was vitally dependent upon the existence of ‘universally valid regulations’ or legal norms.<sup>108</sup> This is why ‘equality before the law became the bourgeoisie’s main battlecry’ in its struggle ‘against the feudal lords and the absolute monarchy’.<sup>109</sup> Here we see Engels asserting, exactly as did Marx, that it is in the sphere of commodity circulation that the genesis of the legal form is to be located.

In other words, the founding fathers of Marxism were at one in their comprehension of the legal form as the materialization of the exchange relations

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105 Pashukanis op cit 38.

106 Engels (1990: 598).

107 Ibid 597.

108 Ibid 598.

109 Ibid.

of bourgeois society. Pashukanis's achievement was to perceive the pattern in the pronouncements of Marx and Engels, and to spot the outlines of a theory of law in them. Thereafter, as he himself owns,<sup>110</sup> it was an easy matter to extrapolate and elaborate the Marxist fundamentals into a coherent Marxist general theory of law.

In light of the above, it can hardly be denied that Pashukanis's position has impeccable Marxist credentials. Even the hostile Korsch, who is often virulent in his criticism, concedes that:

‘all these revolutionary ideas put forward by Pashukanis are not actually new, but restore and renew the same ideas expressed by Marx himself, partly by implication, but to a large extent explicitly as well, as many as eighty years ago in his critique of *German Ideology*, in the *Communist Manifesto*, and repeated decades later in *Capital* and the *Critique of the Gotha Programme*.’<sup>111</sup>

The argument that Pashukanis is unMarxist because he foregrounds exchange at the expense of production must, in this context, be rejected as a trivial one. As demonstrated above, neither Marx nor Engels derived the legal form from the process of commodity production *per se*. Critics who claim that this is what Pashukanis ought to have done obviously have failed to notice that both Marx and Engels did exactly what Pashukanis did, and that is to anchor the analysis of the legal form in the relations of commodity exchange.

The truth of the matter is that the legal form cannot be derived from the process of production. The Marxist epistemology does not countenance a production-centred derivation, for the reasons which follow. Production is a necessary and natural human activity. It is the prime condition of human existence. Human history is the history of successive modes of production.

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110 Pashukanis op cit 38-39.

111 Korsch op cit 190.

Production preceded the emergence of law and will, in the long view of history, survive the demise of law.<sup>112</sup> Law is an attribute of a determinate stage in the development of production, namely, the stage at which production becomes infused with the ethos of exchange. This is the epoch of generalized commodity production. It is the epoch in which the *raison d'être* of production becomes exchange. It is the epoch in which the production process itself is premised upon the constant sale and purchase labour-power, that is, the constant exchange of the only value-producing commodity. The point is that the legal form emerges when production is no longer natural, when it has become production for exchange. And the legal form expresses this transformation in the nature of production, from use to exchange. Indeed, the legal form becomes necessary precisely when this transformation occurs. It stipulates the transformation.

In this context the legal form must needs be derived from the exchange relationship. It is called into existence by the transformation from the natural to the commodity economy. That transformation is characterized by the establishment of exchange as the new purpose of production. It is entirely appropriate and expected that the analytical interrogation of the legal form should proceed from this historical fact. Law as we know it did not exist before the exchange economy. It is sensible to look to the new relations of exchange to comprehend the new legal relations which were generated by them. Indeed, there was no other rational basis on which to delimit the legal form. Any attempt to derive it from the process of production was doomed to failure unless it comprehended that that process was exchange-driven.

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<sup>112</sup> The idea that law is an aboriginal and eternal feature of human society is a popular piece of bourgeois idealism. Of course, this is to be expected from a class whose rise was synchronous with the rise of the legal form. The bourgeoisie cannot admit of the historical specificity of law without admitting of its own historical transitoriness. Hence its mythologizing of the legal form as a universal. See Pashukanis op cit 144.



In the commodity economy, production leads ineluctably to exchange. An exchange relation stands at both the beginning and at the end of the commodity production process.<sup>113</sup> Generalized commodity production is simply and singularly about exchange. It is the stage in the development of the forces of production in which the motif of production changes from production for use to production for exchange. Marx and Engels understood this. So did Pashukanis.<sup>114</sup> That is why they turned to the exchange relation as the premise of their analysis of the legal form. And that is why the charge that Pashukanis is unMarxist for elaborating a so-called commodity exchange theory of law is a spurious one.

There is a connection between the charge of abstractness and the allegation of methodological waywardness in that the force of abstraction is a vital element of the method used by Pashukanis to construct the general theory. The exchange relation is the commodity relation purified. The sphere of circulation is the site at which the true nature of the commodity is to be comprehended, free of non-economic diversions or distractions. Capitalist relations of production are invariably demarcated in terms of an articulation of economic and non-economic features. The analysis of the legal form needs to abstract from the non-economic features of the economic structure. The process of abstraction led Pashukanis, as it did Marx and Engels before him, to the exchange relation as the unencumbered source of the legal relation and hence as the key to the analysis of the legal form. The process of abstraction enabled him to set aside those aspects of the relations

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113 The process starts with the sale and purchase of labour-power and ends with the sale and purchase of the finished commodity.

114 This is why Pashukanis (op cit 119) readily qualifies his discussion of the relationship between the commodity and legal forms with the remark that: 'All of this presupposes the appropriate level of development of the productive forces.' The issue for him was not whether the legal form should be derived from production or exchange. The real issue was that the legal form emerges with the break-up of the natural economy, when the forces of production have developed to the stage where production becomes production for exchange.

of production which do not advance the comprehension of the legal form, and to identify the exchange relation as the core relation in the delimitation of this form.

The 'abstractness' of the general theory is, in this connection, not only unavoidable but necessary. Pashukanis needed to set aside all factors which would have contaminated the integrity of the exchange relation and hence detracted from his theoretical project. A general theory of law cannot be sidetracked into the day-to-day struggle between proletariat and bourgeoisie. It cannot even be concerned about the class composition of the legislature or the class prejudices of the judiciary. It needs to be located at a level of abstraction which will facilitate a materialist explanation of the existence of and need for the legal form itself. That is why Pashukanis had to work at the 'rarefied' level of exchange relations, where the commodity subsists in its ideal milieu, unimpeded by social and political device, and relying upon human intervention only as the motor of its own movement.

It has already been noted that Pashukanis himself never referred to his theory as the commodity exchange theory or the commodity form theory of law. These are descriptions invented by commentators. As a Marxist, he knew that the legal form had to be derived from the relations of production (and not from the process of production).<sup>115</sup> And, by employing the force of abstraction, he was able to isolate the exchange aspect of the relations of production as the true material source of the legal relation, and to delineate the legal form as a historically specific form which could be comprehended only as the necessary non-economic expression of the commodity form.

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115 The parenthetical reminder is necessary because the critics seem to have reduced the relations of production, which is a binary of production and exchange, to the singularity of production.

Pashukanis was thus entitled to claim to have discovered the structure of a general theory of law which was true to the materialist conception of history discovered by Marx and Engels. His submission that the legal relation is stipulated by the exchange relation is the conclusion which he reached in his quest for a general theory of law informed by the principles of the materialist conception of history. His detractors routinely ignore the method he used to reach his conclusion. They tend to start their critique where he ends his investigation, and then claim that he is unMarxist for supposedly considering exchange to be prior to production. Any serious reader of *Law and Marxism* knows that the critics have done Pashukanis an unwarranted injustice. The general theory was constructed according to the first principles of the Marxist methodology and the conclusions reached, albeit distasteful to many (as so many Marxist positions invariably are) are entirely plausible and defensible within the Marxist paradigm.<sup>116</sup>

### 5.6.3 Capitalism and the Legal Form

The third criticism of Pashukanis, derived from the second, is that he understood law to be a specifically capitalist phenomenon and hence denied the existence of law in pre-capitalist social formations. Warrington's statement of the issue is representative:

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116 It is remarkably ironic that one of the most sympathetic appreciations of Pashukanis comes from the non-Marxist Fuller (1949: 1159), who has the following to say of *Law and Marxism*: 'In this short book Pashukanis expounds with clarity and coherence an ingenious development of Marxist theory that has been called the "Commodity Exchange Theory of Law." His work is in the best tradition of Marxism. It is the product of thorough scholarship and wide reading. It reaches conclusions that will seem to most readers perverse and bizarre, yet in the process of reaching these conclusions it brings familiar facts of law and government into an unfamiliar but revealing perspective. It is the kind of book that any open-minded scholar can read with real profit, however little he may be convinced by its main thesis.'

‘Pashukanis held that law was a peculiarly capitalist problem. This is a result of his commodity form theory. As Pashukanis defined all law as merely the outgrowth of the exchange of commodities, it follows that to be consistent, social arrangements prior to the commodity form of society were not legal.’<sup>117</sup>

This is a comparatively minor criticism when set against the first two and need not occupy us unduly. However, once again the critics have misunderstood Pashukanis.

The capitalist mode of production is the apotheosis of the commodity economy. Capitalism is generalized commodity production. The beginnings of the legal relation may be perceived in the milieu of petty commodity production. But it is only with the advent of generalized commodity production that we see the development of the legal relation proper, that is, the development of the relation founded upon the perfect equality of all legal subjects. While the existence of a pre-capitalist legal subjectivity may be granted, it was rudimentary and fragmentary, and did not include equality before the law. Marx has this to say:

‘Equality and freedom presuppose relations of production yet unrealized in the ancient world and in the Middle Ages.’<sup>118</sup>

Pashukanis adds that with primitive peoples ‘it is difficult to distinguish law from the total mass of normative social phenomena’ and that ‘even in medieval Europe only embryonic legal forms existed’.<sup>119</sup>

The juridical person was, at best, an *infans* in the world of petty commodity production and undeveloped exchange. Legal subjectivity, in this connection, may indeed be understood as a specifically capitalist phenomenon. Its

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117 Warrington op cit 59. See also Stone op cit 43, and Collins op cit 110-111.

118 Marx (1973: 245). .

119 Pashukanis op cit 58.

development was prescribed by the structural requirements of the development of the capitalist mode of production. Thus, Pashukanis writes that:

‘in bourgeois society, in contrast to societies based on slavery and serfdom, the legal form attains universal significance, legal ideology becomes the ideology par excellence, and defending the class interest of the exploiters appears with ever increasing success as the defence of the abstract principle of legal subjectivity.’<sup>120</sup>

The ‘juridical moment of the Person’ identified by Marx is thus a specifically bourgeois moment. It is emblematic of the generalization of commodity production, the destruction of the natural economy and the victory of capitalist social relations of production.

The juridical person comes of age with the capitalist mode of production.<sup>121</sup> Law, then, is the most immediate superstructural conjugate of the social relations of production of the commodity economy. And legal subjectivity is the *animus* of the commodity relation. The following explanation by Norrie sets matters right and disposes of Warrington’s allegation easily:

‘Pashukanis did *not* say that there was *no* law in the middle ages. He said that there was no conception of the *abstract* legal subject but that there *were* “embryonic legal forms” in existence at that time. Thus Pashukanis did not say that law was a peculiarly capitalist problem. What he said was that law in its purest and most developed form ... was a peculiarly capitalist phenomenon.’<sup>122</sup>

What is more, this is an aspect of Pashukanis’s argument which is not especially complicated or obscure. It is completely accessible to anyone who has a mind to engaging it. Certainly, the non-Marxist Fuller has no difficulty whatsoever with understanding fully this aspect of the general theory. He states:

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120 Ibid 45.

121 According to Pashukanis (ibid 61), its demise will mirror the demise of the capitalist mode of production.

122 Norrie op cit 430, original emphasis.

In truth, the only law is bourgeois law. To be sure, legal institutions in embryo can be found in a feudal or slave society, where they are intertwined with religious and military elements. Modern scholars are likely to misinterpret these rudimentary legal elements in a pre-capitalist society as the equivalent of modern law. Actually, these embryonic and undifferentiated legal elements are like the first tentative gropings toward a capitalistic organization that can be detected in even the most primitive societies. The full inner logic of the conception of law can assert itself only under capitalism.<sup>123</sup>

It is revealing surely that a non-Marxist should understand Pashukanis on this issue without difficulty, while so-called Marxist critics seem to founder, ending up attempting to present their own failure to comprehend Pashukanis as a failure in comprehension by Pashukanis.

#### 5.6.4 Pashukanis, Anarchism and Stalinism

The fourth criticism of Pashukanis, albeit not as popular as the three discussed above, is as important for being overtly political. The basic argument, as explained by Beirne & Sharlet, is that Pashukanis's general theory was

'a left communist, or perhaps anarchist, theory which, if implemented, would greatly impede the construction and reproduction of socialist relations of production in the USSR.'<sup>124</sup>

Schlesinger makes the argument thus:

'It is not difficult to understand why the Soviet dropped a theory which could only be interpreted as an apology either for capitalism or for lawlessness, in the sense of anarchy or arbitrary rule.'<sup>125</sup>

Pashukanis, it would appear, is deemed by some to be the theoretician of a kind of lawless anarchy in Bolshevik Russia. This is a line of criticism which was championed by Vyshinsky, who was to become Stalin's chief prosecutor in the infamous Moscow Trials.<sup>126</sup> And it is linked directly to Pashukanis's liquidation

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123 Fuller op cit 1161.

124 Beirne & Sharlet op cit 23.

125 Schlesinger op cit 164.

126 Vyshinsky (1954: 53-57).

as a supposed enemy of the people in 1937.<sup>127</sup>

This criticism does not stop with the charge of anarchism. It goes further, to implicate Pashukanis and his general theory in the rise of the very Stalinist regime which liquidated him. Thus, for example, Beirne & Sharlet argue that his theory entailed a legal nihilism which subjected the judicial process to political ends and which ‘inevitably contributed to the growth of a jurisprudence of terror’ so characteristic of Stalinism.<sup>128</sup>

It is submitted that this criticism is entirely without merit, in both its aspects. The accusation of anarchism was long ago disposed of by Stuchka who analyzed it as a reactionary agitation for bourgeois legal certainty in the turbulence of a proletarian revolution, which revolution necessarily had to smash the legal system and abolish the laws of the bourgeoisie.<sup>129</sup> He insisted that the Bolshevik assault upon bourgeois law did not entail lawlessness and anarchy. The Bolsheviks subscribed to a revolutionary legality administered by the People’s Courts. Thus he declares:

‘No, we are not anarchists. Quite the contrary. We attribute a great deal of significance to laws, perhaps even too much at the moment, but only to laws of the new order. And those laws correspond to the old laws only insofar as the new order can agree with the atrophying, repudiated order.’<sup>130</sup>

The Bolsheviks were Marxists in the classical tradition, and were thereby implacable opponents of anarchism. Pashukanis was a Bolshevik and, despite

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127 Hazard (1957: 385-386) says of Pashukanis’s liquidation: ‘No overt act of treachery was disclosed. He was criticized primarily for having preached a philosophy of law which, had it been followed to its conclusions, would have undermined the foundations of the Soviet state, and it was hinted that his theory had been developed for the purpose of bringing about the end of the Soviet system of government.’

128 Beirne & Sharlet op cit 21-23. See also Warrington op cit 60.

129 See Stuchka (1990b: 187-188 and 1990c: 190).

130 Stuchka (1990a: 162). See also Stuchka (1990c: 190): ‘Of course, the Bolsheviks did not reject the significance of laws. They perhaps even believed in them too much.’

their other differences, shared with Stuchka the Bolshevik commitment to a revolutionary legality.

The charge that Pashukanis's theory of law encouraged the rise of Stalinism is a particularization of the well-worn argument that Stalinism is the direct heir of Bolshevism and which would blame, for example, Lenin's democratic centralism or Trotsky's internationalism for Stalin's betrayal of the revolution. It is an argument which no Marxist can take seriously, simply because there was nothing Stalinist inherent in the politics of Bolshevism. Pashukanis's theory was, if anything, an impediment to the anti-Bolshevik agenda of Stalinism. This is why he had to be liquidated. Thus Lipson says:

Whatever the merits of this approach in theory, it could not please the rulers of the Soviet Union, especially in the 1930s: the authorities practising their kind of lawlessness under label of a search for stability were not able to countenance the scholarly justification of the transcendence of law.<sup>131</sup>

Even Warrington, who is one of Pashukanis's most uncomplimentary critics, discounts this argument, in the following terms:

'Some commentators have argued that Pashukanis's attitude paved the way for Stalinism. But Pashukanis tried, however inadequately, to produce a theory that would reach beyond the confines of the restraints of all forms of legality. It seems a little unfair to blame Pashukanis's theory for the terror that followed merely because Pashukanis himself was politically inept, and later even wilfully blind. Only by assuming that if a society shakes off the need for law that it must then regress to a dark age is it possible to see Pashukanis's *General Theory* as a step towards arbitrary power.'<sup>132</sup>

Pashukanis was neither a crypto-anarchist nor a latent Stalinist. He was a Bolshevik who elaborated a Marxist general theory of law which embraced a revolutionary legality while anticipating the demise of the legal form in a future classless society.

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131 Lipson (1983: 193-194).

132 Warrington op cit 60-61.



## 5.7 The Legal Subject and the Commodity

Of the fundamental juridical concepts which he identifies, Pashukanis places the legal subject at the heart of his theory, as emblematic of the legal form. Comprehension of law requires comprehension of the legal subject, as the prime component of the legal relation. For Pashukanis, there is a structural coincidence between the commodity as the elemental economic unit and the subject as the elemental legal unit. In a capitalist economy, every person is transformed into a legal subject exactly equal to every person. Legal subjectivity is the great leveller amongst people in the same way as labour time is the great leveller amongst commodities. The legal subject and the commodity are, in this regard, umbilically linked. However, too many critics understand this connection as a purely logical one, made by Pashukanis in a flash of brilliance.<sup>133</sup> Hence the oft-heard allegation of abstractness.

However, the transformation of the person into the legal subject is not simply the logical analogue of commodity exchange. The commodity form and the legal form are not mere logical counterparts. The transformation of the person into a legal subject was historically determined by the transition from natural to commodity economy. Pashukanis is unambiguous on this matter:

‘Like the majority of jurists, Dernburg tends to treat the legal subject as ‘personality in general’, that is to say, as an eternal category beyond particular historical conditions. From this point of view, being a legal subject is a quality inherent in man as an animate being graced with a rational will.’<sup>134</sup>

He continues:

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<sup>133</sup> See, for example, Stone op cit 43 and Warrington ibid 48.

<sup>134</sup> Pashukanis op it 117.

‘Historically, however, it was precisely the exchange transaction which generated the idea of the subject as the bearer of every imaginable legal claim. Only in commodity production does the abstract legal form see the light.’<sup>135</sup>

In other words, the homology between the commodity and the legal forms is given historically, by the development of capitalist relations of production. The capacity to become a legal subject is inscribed in the evolution of human society into a society of generalized commodity production. The history of the development of law is the history of the development of the legal subject. Marx and Engels recognized this fact long before Pashukanis did. When, therefore, Pashukanis bases his general theory of law upon the legal subject he is systematizing what Marx and Engels had opportunity to state only episodically. This is why nothing in his theory violates any of the fundamental tenets of Marxism. It is also why, for the purposes of this dissertation, his theory is accepted as definitively and indefeasibly Marxist.

## 5.8 Pashukanis and the Criminal Law

The last chapter of *Law and Marxism* is titled *Law and the Violation of Law* and is devoted to an analysis of criminal law and criminal justice. Pashukanis always made it clear that the historical basis of the general theory is private law, specifically the law of contract. The legal form itself is first posited as a contract between two legal subjects. The law of contract is the branch of law which is both the historical and logical repository of the notion of equivalence.<sup>136</sup> By contrast, the criminal law appears to be far removed from the constitutional fundamentals of the legal form. There is seemingly no natural connection, as there is with private law, between criminal law and the notion of equivalence, which Pashukanis classifies as the ‘first truly juridical idea’.<sup>137</sup>

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135 Ibid 118. See also Arthur (1978: 14).

136 See Pashukanis *ibid* 121.

137 Ibid 168.

However, and despite Warrington's arguments to the contrary,<sup>138</sup> he conceived his theory as properly general and hence applicable to the legal form in all its manifestations, including all its public law manifestations.<sup>139</sup> Lipson sums up Pashukanis's position on the matter cogently:

'He maintained ... that law as a general form - not merely piece by piece, but as a general form - was linked in history to that economic relationship that he said Marx said was at the bottom of all societies that obtained in the interval between the end of primitive family subsistence and the beginning of true socialism: namely, the relationship of commodity exchange.'<sup>140</sup>

For Pashukanis, then, the homology between the commodity form and the legal form is valid also for criminal law,<sup>141</sup> that is, the notion of equivalence which is a structural feature of every contract is also a structural feature of every crime.<sup>142</sup>

138 Warrington (op cit 62) has the following to say about the 'general' aspect of the general theory: 'Pashukanis's theory is really concerned with private law and the chapter on criminal law is only added to attempt a spurious theoretical consistency. Pashukanis merely tries to apply his commodity form theory which had a certain logical force for private law, to criminal law, where in the formulation of Pashukanis at least, it clearly has no place.' He goes on to dismiss the theory of equivalent punishment as 'faintly comic'. However, Stone (op cit 44-45), who is no friend of Pashukanis, finds nothing wrong with or comic about his analysis of criminal law. Indeed, he opines that Pashukanis's 'views on criminal law are insightful' and submits that they 'may be analogized to many other areas of law'. See also Norrie (op cit 432-434) who shows conclusively that it is Warrington's argument which is spurious.

139 See Pashukanis op cit 40.

140 Lipson (1983: 192). See also Norrie (op cit 434) who finds 'good grounds for taking seriously Pashukanis's claim that his is a general theory of law, and not one illicitly generalized from private civil law'.

141 Jakubowski (op cit 49), who adheres to Pashukanis's central arguments, holds that: 'Public law regulates the relations between the state and public institutions, and between these and the citizens; it serves to execute and protect private or civil law by means of the power of the state. The foundation of all these relations is still legal subjectivity and the recognition of the legal capacity of man, which give the relations of domination a general form.'

142 See Arthur op cit 15, Stone op cit 44 and Jakubowski ibid 49.

In this regard, he submits that crime is a particular form of contract. It is a retrospective contract.

‘Felony can be seen as a particular variant of circulation, in which the exchange relation, that is the contractual relation, is determined retrospectively, after arbitrary action by one of the parties.’<sup>143</sup>

The party who has taken the arbitrary action is the offender. The offender does not wish the contract. He intends his conduct to be free of any obligations for himself. He wishes a one-sided relation, from which he is the sole beneficiary and in terms of which the victim is an utter loser. The criminal law intervenes to abolish the privilege of asymmetry claimed by the offender. The state impresses him into a contract after he has already had his satisfaction. Faced with the might of the state, he is forced to keep his side of the bargain and render performance to his victim. By his crime, the offender has violated the principle of equivalence which defines all things juridical. The criminal law exists to reinstate this juridical prime directive whenever it has been so infringed.

The principle of equivalence is foundational to the commodity economy and hence to the nature of bourgeois justice. As the principle which stipulates the commodity and legal forms and their interrelation, it is a centrepiece of the general theory of law. It thus also governs the comprehension of crime and punishment. When Pashukanis defines a crime as a retrospective contract, he is invoking the principle of equivalence. He is doing the same when he analyses punishment as an exchange transaction. In other words, criminal justice is about equivalent requital. For Pashukanis, then, the principle of equivalence is a theoretical imperative. His general theory stands and falls by it.

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143 Pashukanis op cit 168. Melossi & Pavarini (op cit 2) refer to this formulation as ‘the famous thesis of Pashukanis’.

Whereas the criminal law is not as conspicuously linked to the principle of equivalence as is the law of contract (and private law in general), it is the branch of law in which the legal form is most conspicuously present. For, it is in the criminal law that the legal subject is found in its most impersonal and abstract form. It is in the criminal trial that 'the juridical element first and most crudely detaches itself from everyday life and becomes fully autonomous'.<sup>144</sup> It is here that the juridical moment peaks, in the 'transformation of the actions of a concrete person into the proceedings of a legal party, that is of a legal subject'.<sup>145</sup> In other words, criminal law sets the high-water mark for legal intercourse. It is the branch of law which depersonalizes actors most fully in order to equalize them as legal subjects most completely.

In this regard, the criminal law is synecdochic for the law itself.<sup>146</sup> It represents, in telescoped terms, all the characteristics of the legal form. There is no more loyal commitment to the notion of equivalence than the literal replacement of the victim by the state in a criminal matter. Prior to the replacement, the offender, as individual, had lorded it over the victim, as individual, and had unilaterally violated the principle of equivalence. With the entry of the state into the criminal proceedings, both offender and victim are transformed from specific individuals into general legal subjects, the advantage of the offender is eradicated by his impressment into a retrospective contract, and the principle of equivalence is thereby rehabilitated.

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144 Pashukanis *ibid* 167.

145 *Ibid*.

146 *Ibid* 168.

## 5.9 Punishment and the Principle of Equivalence

The criminal sanction epitomizes the operation of the rule of equivalence in the criminal law. It is the performance due by the offender under the contract which he has concluded with the victim. If crime is the violation of the principle of equivalence then punishment is its vindication. Punishment is an inherently juridical notion. As such, its genesis coincides with the genesis of the commodity form. And its development mirrors the development from petty to generalized commodity production.<sup>147</sup> In prehistoric times, justice was blood revenge, initially indiscriminate but moderated over time by the *lex talionis* or the principle of equivalent requital.<sup>148</sup> The *lex talionis* developed out of the material conditions of existence of the primitive commune, and meant, essentially, the customary regulation of blood revenge according to the primitive communist commitment to equality in all things. The modern principle of equivalence has its historical roots in the system of composition. This was one of the consequences of the break-up of the primitive commune under the influence of the development of commodity production. Composition is the *lex talionis* commodified. Till then the principle of equivalence had been operationalized in exclusively physical terms. With the advent of composition, equivalence took on an economic character. Literal equivalence gave way to economic equivalence, and biological formulae were replaced by calculation of abstract values.<sup>149</sup>

The transition from talionic blood revenge to talionic composition is a qualitative one. It corresponded with the historic transition from the natural to the commodity economy. It marked the movement from custom to law, that is, from the pre-legal to the legal epoch in the evolution of human society. The juridical

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147 See Chapter Two above for a survey of the evolution of punishment.

148 Pashukanis op cit 168.

149 Ibid 170. See also Melossi & Pavarini op cit 2-3: 'The transition from private vendetta to retributive punishment, that is, the transition from an almost "biological" phenomenon to a juridical category, requires as a necessary precondition the cultural dominance of the concept of equivalents based on exchange value.'

moment arrives when the principle of equivalence is detached from its aboriginal biological roots and redefined in abstract economic terms. The concept of the juridical is defined in terms of the principle of equivalence. For an institution to be juridical it must, therefore, be characterized by the exchange of equivalents. Punishment, in its evolutionary aspect, is such an institution. The offender has to pay for the harm he has caused, and the payment must be commensurate with the degree of harm suffered by the victim. In this context, the criminal sanction becomes 'a form of exchange, a peculiar form of circulation, which has its place alongside "normal" commercial circulation'.<sup>150</sup> Criminal law is thus as much subject to the principle of equivalence as is contract law or any other branch of private law. Indeed, for Pashukanis:

'the characterisation "criminal law" becomes utterly meaningless if this principle of the equivalent relation disappears from it'.<sup>151</sup>

Such is the intended reach of the general theory of law.

Like law itself, punishment is an attribute of the commodity economy. It, too, is governed by that property which is at the heart of the value of every commodity, namely, labour time. Historically, the form of punishment in which criminal justice has summated is imprisonment, that is, the exchange of a determinate portion of the offender's freedom, measured in time, for the harm his crime has caused the victim. As Pashukanis demonstrates, it is not a difficult thing to understand the jail term as a variant of the exchange transaction which underlies the legal form. Despite the emergence of many other forms of criminal sanction, incarceration has remained the dominant form of punishment in the capitalist world, including the advanced capitalist social formations. Compared to

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150 Pashukanis *ibid* 176.

151 *Ibid.*

the other available forms of punishment, imprisonment has turned out to be the hardy perennial.<sup>152</sup>

There is a natural connection between imprisonment and the commodity economy. This is because it articulates the principle of equivalence most completely, more so even than the fine. Not every offender can afford to pay a fine. But every offender can be incarcerated. The prison (despite whatever sordid conditions the offender may have to endure) is the flagship of equality in the criminal justice system. Imprisonment is the penal materialization of the principle of equivalence. It is the paradigmatic means whereby the state is able to recover the juridical relation which the crime had infracted, and to secure the preservation of the legal form.

The commodification of punishment is no more evident than in the prison sentence to be served in terms of hard labour, symbolized by the image of the chain gang.<sup>153</sup> Such a sanction is a pure exchange transaction. It commodifies the harm suffered by the victim and demands from the offender an amount of abstract labour time equivalent to the harm he has caused. There is, of course, no material difference between imprisonment with and without hard labour. The latter is a simply a 'humane' variant of the former. The former merely makes express the link between the penal regime and the commodity. In any event, most imprisonment regimes include the performance of a certain amount of work by the prisoner, either in the prison or in the community.

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152 See Melossi & Pavarini op cit 185, original emphasis: 'Punishment in prison – as the deprivation of a *quantum* of liberty – becomes punishment *par excellence* in a society producing commodities; *the idea of retribution by equivalent* thus finds in prison punishment its most complete realisation precisely in so far as (temporary) loss of liberty represents the most simple and absolute form of "exchange value".'

153 Hudson (2002: 251) notes 'the return of hard labour' in contemporary imprisonment regimes.



Imprisonment, in any form, including contemporary periodical imprisonment, is essentially an exchange transaction, in which the currency is freedom, measured in determinate time periods. Pashukanis makes the point thus:

‘Deprivation of freedom, for a period stipulated in the court sentence, is the specific form in which modern, that is to say bourgeois-capitalist, criminal law embodies the principle of equivalent recompense.’<sup>154</sup>

He presses home the point in the following vein:

‘The offender answers for his offence with his freedom, in fact with a portion of his freedom corresponding to the gravity of his action. This conception of liability would be quite superfluous in a situation where punishment has lost the character of an equivalent. Were there really no trace of the principle of equivalence remaining, then punishment would entirely cease to be punishment in the juridical sense of the word.’<sup>155</sup>

It is a logical requisite of the commodity economy that its penal regime be centred upon the prison sentence. All other forms of punishment so far devised are supplementary to the prison term. None of the other forms expresses the principle of equivalence quite as faithfully as does the prison sentence. It is the great leveller, not only as regards the inequality between offender and victim, but also as regards offenders *inter se*.

Incarceration removes all differences between offenders at a stroke. It creates the abstract offender, the offender who is the generic criminal, who concentrates in his person all manner and method of criminal behaviour. The prison term is thus a device of equalization. It ensures that the offender gives satisfaction to the victim, and that he does so on terms which are equal relative to every other offender. The expanded reproduction of the commodity economy depends crucially upon the ordered reproduction of the legal form. The prison

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154 Pashukanis op cit 180-181.

155 Ibid 179.

sentence is the one form of punishment which has proved itself indispensable thus far to the reproduction of the legal form in the sphere of criminal justice.

Punishment, then, is necessarily about equivalent requital. It is a conception which is derived historically from the dissolution of the natural economy and the concomitant evolution of generalized commodity production, that is, of an economy of labour time. Pashukanis explains:

‘For it to be possible for the idea to emerge that one could make recompense for an offence with a piece of abstract freedom determined in advance, it was necessary for all concrete forms of social wealth to be reduced to the most abstract and simple form, to human labour measured in time.’<sup>156</sup>

The offender forfeits that portion of his freedom which corresponds to the harm suffered by his victim. In this regard, imprisonment is not only freedom negated but also labour time negated. For, ordinarily, freedom would include the freedom to sell one’s labour power to a capitalist, to be put to use for a determinate time in the production of commodities. Imprisonment, as deprivation of freedom, is thus, for the period of the imprisonment, simultaneously the consumption of potential labour time.

The archetypal capitalist form of punishment is thus intimately linked to the archetypal capitalist form of production and exchange. The spirit of the commodity is so ubiquitous that it penetrates even the steel gates and concrete walls of the prison. The offender will pay for his transgression. And he will do so according to the dictates of the commodity economy which is ruled by the principle of equivalence and which will not countenance any formal violation of this principle. In other words, crime and punishment are subject to exactly the

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156 Ibid 181. See also Melossi & Pavarini op cit 184-185: ‘The idea of the deprivation of an abstractly determined quantity of liberty, as the dominant form of penal sanction can in fact only be realised with the advent of the capitalist system of production, that is, in that economic process which reduces all forms of social wealth to that most simple and abstract form of human labour measured in time.’

same juridical imperative as any legal transaction, namely, the principle of equivalence. This principle is, as Pashukanis put it, the ‘juridical soul’ of criminal proceedings.<sup>157</sup>

As the penal manifestation of commodity exchange, the notion of equivalent requital applies also to all forms of punishment other than imprisonment, including such non-custodial sanctions as the fine, correctional supervision, property forfeiture, and community service. They, too, are structured according to the desideratum of parity which makes of state punishment the juridical phenomenon that it is. Pashukanis captures this idea in the following comment:

‘In principle, punishment in keeping with guilt represents the same form as retaliation in proportion to the injury. Its most characteristic feature is the arithmetical expression of the severity of the sentence: so and so many days, weeks, and so forth, deprivation of freedom, so and so high a fine, loss of these or those rights.’<sup>158</sup>

The form of the criminal sanction is thus of little consequence. The essence of each form, whether custodial or non-custodial, is given by the principle of equivalent requital. As Pashukanis notes, this principle is an ‘essentially absurd idea’ from the non-juridical point of view. But it is an absurdity which cannot be avoided for ‘so long as the commodity form and the resultant legal form continue to make their mark on society’.<sup>159</sup> A rational basis for punishment is possible only if and when it may be reconstructed outside of the juridical paradigm. And it will take a social revolution to transcend this paradigm and deprive it of its current authoritative status.

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157 Pashukanis *ibid* 177.

158 *Ibid* 180.

159 *Ibid* 185.

### 5.10 Class and the Criminal Law

The criminal law transaction is, of course, a public one, in the sense that the state is always a party to it. The offence is construed as a contravention of a state norm, the state steps into the shoes of the actual victim, initiates the criminal prosecution of the offender and generally directs the criminal justice process. Criminal justice is, in a word, an affair of state. But the state in question is the bourgeois state, and criminal justice is thus also bourgeois justice. In other words, in the capitalist era, state hegemony over the criminal justice system is one of the weapons at the disposal of the bourgeoisie to protect its own class rule and to fend off the demands of the dominated classes.<sup>160</sup> Indeed, Pashukanis tells us that 'criminal justice in the bourgeois state is organised class terror'.<sup>161</sup> Such is the class content of the criminal law. It is that branch of the law which expresses most directly the violence immanent in the rule of the bourgeoisie as a class, including that rule in its most advanced legal form of the *Rechtsstaat*.<sup>162</sup>

Hunt considers that Pashukanis's highlighting the class content of the criminal law means that:

'he introduces a sharp polarity between two modes of law, the criminal law as a means of securing class domination and the civil law as the mechanism governing the exchange relations between atomized legal subjects.'<sup>163</sup>

The implication of such an alleged dualism is, of course, that the fit between the so-called commodity form theory of law and the criminal law is, at best, an awkward one. Indeed, it would appear, from Hunt's perspective, that the criminal

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160 Ibid 173. It must be noted that the class nature of the state is not Pashukanis's primary concern. He deals with it only after he has established the role of the state in the reproduction of the commodity and legal forms. These two aspects of 'bourgeois statism' operate at distinct levels of abstraction, the latter at a higher level than the former. It is the latter aspect which is integral to the general theory of law.

161 Ibid.

162 See Jessop (1982: 84-85).

163 Hunt op cit 81.

law is not subsumed within the homology between the legal form and the commodity form and, hence, that the general theory is, after all, not really general.<sup>164</sup>

Hunt is mistaken. He appears not to comprehend that the role of the state as an instrument of class control has to be assessed on a quite different level of abstraction from the place of the state in the general theory of law. Certainly, the fact that the criminal law is readily available as a weapon of bourgeois class rule, even terror, by no means implies its exclusion from the ambit of the general theory. The making of such a connection is not entailed even in the postulates of formal logic. What is readily implied, however, is that the criminal law, as suggested by Jakubowski, harnesses the power of the state 'to execute and protect private or civil law'.<sup>165</sup> In other words, whereas the criminal law may have had very little to do with the production of the legal form, it is imbricated comprehensively in the reproduction of that form.

The legal form summates in the *Rechtsstaat*, the exemplar of 'market relations among formally free and equal individuals',<sup>166</sup> and the criminal law is its most conspicuous guarantor. Whatever schism exists between private law and the criminal law is of Hunt's making, not Pashukanis's. He understood a crime to be a variant of a contract, and therefore considered the criminal law to be as readily incorporated into the general theory as the law of contract.<sup>167</sup> The criminal law

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164 Hunt's position is close to Warrington's, who, it will be recalled, considers the general theory to be a theory of private law, onto which criminal law has been somewhat artificially grafted.

165 Jakubowski op cit 49.

166 Jessop op cit 85.

167 This also makes nonsense of Hunt's (op cit 81) subsequent argument that in an attempt to overcome the alleged dualism between private and criminal law, Pashukanis 'subsumes his attempt to theorize state and criminal law into a theory of punishment'. His theory of punishment is nothing more nor less than a theory of punishment, and one which is entirely consonant with his general theory of law.

may be possessed of a special status as the branch of law which is most obviously associated with the coercive competence of the bourgeois state.<sup>168</sup> But that status does not entail a qualitative difference from private law or from the other branches of public law. And, certainly, it does not disqualify the criminal law as a component of the legal form to be comprehended under Pashukanis's general theory of law.

### 5.11 Criminal Law as Public Law

There is another charge against Pashukanis's analysis of the criminal law which requires some comment. It is the allegation made by Stone, to the effect that:

'Pashukanis's approach does not explain why the state, and not the victim or his or her relatives, is the plaintiff in criminal cases'.<sup>169</sup>

Pashukanis, it would appear, is unable to account for the public nature of the criminal law.

However, like Hunt, Stone is mistaken. As is apparent from the preceding paragraphs, Pashukanis understood the criminal law to be essentially coercive in its operations. However, the fundamentally juridical nature of the commodity economy, exemplified in the concept of legal subjectivity, requires coercion to be public, in the sense that it is formally separated from the exercise of personal power. Thus, Pashukanis writes:

'Coercion as the imperative addressed by one person to another, and backed up by force, contradicts the fundamental precondition for dealings between the owners of commodities ... For in the society

168 Of course, all branches of law rely ultimately upon state violence (or the threat thereof) for their efficacy.

169 Stone op cit 45. Ignatieff (op cit 96-99) has raised the same issue by challenging the 'assumption in Marxist social theory' that capitalism requires the 'state penal sanction', and suggesting that the threat of force is not necessary for the reproduction of 'exploitative social relations'.

based on commodity production, subjection to one person, as a concrete individual, implies subjection to an arbitrary force, since it is the same thing, for this society, as the subjection of one owner of commodities to another.<sup>170</sup>

The core principle of equivalence which defines the commodity economy formally is violated, and the reproduction of the commodity economy is itself rendered precarious, if the coercion which structures it is personalized or privatized. Pashukanis again:

This is also why coercion cannot appear here in undisguised form as a simple act of expediency. It has to appear rather as coercion emanating from an abstract collective person, exercised not in the interest of the individual from whom it emanates ... but in the interest of all parties to legal transactions.<sup>171</sup>

In other words, a public authority with coercive competence is inscribed in the constitution of the commodity economy. So too, by extension, is the public nature of the criminal law, as the branch of law which is most, and most conspicuously, concerned with the exercise of that coercive competence. It should, in this regard, be recalled that when Pashukanis classified the criminal law as a weapon of class rule he referred to organized class terror in the bourgeois state. In other words, for him the public nature of the criminal law was patent, derived directly and necessarily from the structure of the *Rechtsstaat*.

Pashukanis's position reduces to the proposition that capitalism needs a public criminal justice system. That is the answer to Stone's complaint.<sup>172</sup> Private law may well be the 'natural' law of the commodity economy, and may well provide the foundation of every legal transaction. But it is public law, and the criminal law in particular, which secures the conditions for the expanded reproduction of capitalist mode of production. It is not possible for the

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170 Pashukanis op cit 143.

171 Ibid.

172 It is also the answer to Ignatieff's challenge to the necessarily statist texture of criminal justice.

bourgeoisie to entrust its criminal justice system to the operations of private law, as it has its contractual and proprietary regimes. In other words, criminal justice in the commodity economy cannot be privatized justice. It is necessarily statist in its essentials.<sup>173</sup>

Justice in the *Rechtsstaat* must proceed from the principle of equivalence. The parties to a legal transaction may not be equal in fact (as is so often the case even in private law transactions) and one may have at his disposal many more resources than the other. But the stronger party cannot expect to rely upon this power differential being translated into an automatic legal advantage. Formally, at least, he has to accept an equality postulate, namely, that his counterpart is his equal at law.<sup>174</sup> This is the necessary consequence of their legal subjectivity.

However, by his committing the crime the offender declares his rejection of the basic juridical principle of equivalence, and violates the substance of the concept of legal subjectivity. And in so doing, he debauches the integrity of the very idea of privatized justice. His crime is a declaration of resistance against the equality postulate. He thereby refuses to acquiesce in the consequences of his own legal subjectivity. He rends the legal subjectivity of his victim and, by necessary implication, undermines the cohesion of the universe of legal subjects. His crime does violence not merely to the interests of the victim but to the very notion of the juridical and calls its existence into question. Indeed every crime plunges the idea of legal subjectivity and its accompanying equality postulate anew into crisis. Every crime is an exercise in inequality. Every crime is a practical failure of the equality postulate. It takes a power superior to the offender

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173 There has been a recent rapid growth of private prisons. See Bates (1999: 595) and Morgan (2002: 1147-1149). However, this development does not entail a move away from the basic idea of state punishment. The private prison, like the state prison, continues to enforce a public disposition of criminal matters.

174 See Pashukanis op cit 143-144.



to re-assert the idea of the juridical and to re-affirm its general validity. That power, as Pashukanis has made clear, is the bourgeois state. Only the state is able to enforce the principle of equivalence against the offender. Only the state can insist, and mean it, that the offender not benefit at the expense of the victim and that he perform his side of the bargain which he initiated by his criminal conduct.

Criminality constitutes a recurrent assault upon the founding principles of the legal form. A crime is a rebuttal of the presumption of equality inscribed in the legal form. The offender introduces an inequality postulate into legal intercourse. His crime is an assertion that he is no mere legal subject, formally equal to every other legal subject. Indeed, his conduct is a manifesto of personal power against the juridical principle of equivalence. He asserts his interest to be prior to those of his fellow legal subjects, and thereby approves 'the subjection of one owner of commodities to another'.<sup>175</sup> His crime is a revolt against the levelling effect of legal subjectivity in the commodity economy. He is a true champion of 'the concrete individual' (as opposed to the abstract legal subject)<sup>176</sup> and is not averse to one such concrete individual lording it over another. The criminal offender is, in this connection, an inveterate anti-egalitarian, a devotee of the pre-legal, who lives, instinctively, by Marx's famous dictum that equal right is, in its content, a right of inequality.<sup>177</sup> Thereby he repudiates the very notion, that is, of legal subjectivity which underpins the legal form and structures all private law relations.

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175 Ibid 143.

176 Ibid.

177 Marx (1978: 530). The offender is, of course, likely blissfully unaware of both the man and his dictum.

It follows, necessarily, that the response to the crime cannot be a privatized one. The crime has destroyed the legal equality between victim and offender, and has placed a question mark over the efficacy of legal subjectivity as a juridical fundamental. By committing the crime, the offender has adjudged the constraints upon arbitrariness inscribed in sphere of privatized legal relations to be inadequate to the defence of and, by the same token, the re-assertion of the equality postulate. The fate of the latter thus becomes a public concern, that is, a matter for state action. That which the offender has sundered cannot, logically, be relied upon to reconstruct him as a compliant legal subject. Criminal justice is thus necessarily public justice. Only the state has the capacity to extract from the offender the conformity which is required to reconcile him to the idea of legal subjectivity, both his own and everybody else's. It is one of the dialectical ironies of the legal form that the efficient reproduction of the private sphere is dependent, ultimately and unavoidably, upon the public power. The public is the true guarantor of the private.

All juridical phenomena begin as private affairs. They do not, however, all end as such. Criminal justice is the example *par excellence* of a juridical phenomenon which must be or must become a public affair. Without the intervention of the state, the rule of equivalence, once violated, could never be re-established as guiding principle of the legal transaction which is in progress. And if the rule of equivalence is not re-instated, then the fabric of the entire commodity economy is called into question. The legal subject who will not obey the rule of equivalence is challenging his necessary existence as a legal subject. He is claiming a status which does not conform to the fundamental stipulations of the commodity economy and its *Rechtsstaat*. He is refusing to be a legal subject. He is impugning the concept at the heart of the legal form. He is, in a word, challenging the logic of the juridical worldview born of the capitalist mode of

production. Objectively, that places him in the company of the revolutionary who is consciously devoted to demolishing the commodity economy root and branch. The criminal, like the revolutionary, is a recalcitrant legal subject. He will be encouraged in his recalcitrance if he is not subjected to the authority of the state as abstract legal subject and hence representative of all legal subjects. The state is the embodiment of the acquiescent legal subject, but with the power to subdue all its non-acquiescent fellows.

Of all the branches of law, it is criminal justice that is perhaps the most eminently public. It is in this sphere where the violent nature of the law is most evident, and it is hence in this sphere where it is necessary to restrict the use of coercion to the formal organs of the state.<sup>178</sup> The private settlement of criminal disputes is not properly legal, in the sense that it is not an organ of state that has the final say in the disposition of the matter. Such private resolutions either hark back to a pre-legal past or portend a post-legal future. Criminal justice is thoroughly legal. Not only is it dispensed by the state, but it is also the only variant of justice which involves the state as a party. It cannot be otherwise.

Civil and criminal cases differ essentially in the fact that the former involve private parties on both sides while the latter involve a public party on one side. This difference is a necessary one, entailed in the nature of crime. Both civil and criminal infractions violate the principle of equivalence which lies at the heart of all legal relations. However, the civil litigant typically is relying upon or seeking an interpretation of the principle of equivalence which serves his interests. He is, on the face of it, concerned to uphold the principle of equivalence. The plaintiff will argue that the defendant has violated the principle, while the defendant will urge that it is the plaintiff who is in breach. The point is that both parties to a civil matter proceed from the premise that the principle of equivalence is a valid one.

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178 Seagle (1946: 6-7).

Of course, each is operating from self-interest. Each submits that the other has violated the principle and both impress upon the court the need for a decision that will re-establish the operation of the principle *inter se*. While the submissions of either are entirely self-serving, there is no argument in such matters about the validity or legitimacy of the juridical relation. Civil disputes are about using that relation to self-advantage. They do not require state intervention, except as ultimate arbiter as to the interpretation of the principle of equivalence.

The criminal offender has no such agenda. He does not seek to use the principle of equivalence to his advantage. Instead, he rejects the principle, albeit for the most part unthinkingly or unwittingly. Whereas a civil infraction may begin as an attempt to evade of the principle of equivalence, there is generally no question about the validity of the principle itself. By contrast, a crime is a negation of the principle itself. It is an overt denial of the founding term of the legal relation. The offender asserts a claim to operate outside the parameters of law, and not only in the sense of breaking the letter of the law. Objectively, a crime is, therefore, an act of outright subversion of the legal relation. The offender has no interest in harnessing the principle of equivalence to his cause. By committing the crime, he has renounced it. And he has no stake in co-operating or even competing with the victim in a court case to settle the interpretation of the principle. In these circumstances, it is necessary for the state to become a party to the matter and to compel the offender to respect the validity of the principle of equivalence and to participate in its operation.

The crime is a repudiation of the principle of equivalence. The criminal trial is an affirmation of the principle, during which the state deploys its power to make the offender 'play the game' which his crime has rubbished. Minor & Morrison conclude that:

‘From a Marxist perspective, state control over deviance is an integral feature of modern capitalism and is not likely to be relinquished.’<sup>179</sup>

The truth is that ‘state control over deviance’ cannot be relinquished. The capitalist social formation requires a criminal justice system which operates under the aegis of its state. The notion of a private criminal justice does violence to the idea of the legal subject who lives (and dies) by the principle of equivalence. Despite their private origins, the legal form and its concomitants cannot survive without the patronage of the state.<sup>180</sup> Pashukanis’s general theory of law comprehends the statist necessities of criminal justice.

### 5.12 Pashukanis and Christie

It is time for an assignation between Christie and Pashukanis. If, according to its self-image, restorative justice is to be comprehended as the negation of criminal justice and a crime is to be understood as a private legal transaction, then it is Christie’s notion of conflicts as property that continues to provide the theoretical springboard for the restorationist project. There has been no other major theoretical advance or proposition since Christie’s. The contribution of Braithwaite & Pettit injected a republican aspect into the theory of restorative justice, but did not depart fundamentally from the proprietary concept of criminality developed by Christie. And, as argued in the opening section of this chapter, all non-proprietary theories of restorative justice founder for failing to make explicit the genetic concordance between privatized justice and property. The remainder of this chapter will therefore be concerned to assess Christie’s

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179 Minor & Morrison op cit 124.

180 Only the state possesses the resources to defend the principle of equivalence and to compel the offender to abide by its imperatives. Every criminal trial is about making the offender pay for his indifference to the principle and extracting from him the required, albeit retrospective, obeisance to the principle. The state is the only institution capable of doing this on a large scale.

proprietary theory, as the epistemological fundament of restorative justice, in terms of Pashukanis's general theory of law.

It will be recalled that, according to Pashukanis, the legal form is the materialization of the relations of commodity production, specifically of generalized commodity production. In other words, law proper is an attribute of the capitalist mode of production; the pre-capitalist modes of production were also all pre-legal societies in the sense that none of them evinced a juridical worldview. Every properly legal system is founded upon the fundamental idea of the legal subject, as bearer of legal rights and duties, who is the motor force of the legal relation. The legal subject begins as a commodity owner and acquires his status as a subject in order to trigger the circulation of commodities. In other words, every legal subject is simultaneously a proprietor, at least of the value-producing commodity, labour power. Legal subjectivity, then, comes into existence as the correlative of commodity exchange. It is, in this connection, an eminently private-law concept, structuring the circulation process according to the specificities, especially, of the law of contract and the law of property. The legal form is, in Pashukanis's terms, the analogue of the commodity form, and the legal subject the conjugate of the commodity owner. Juridification and commodification are complements, both diachronic and synchronic, of each other.

Unlike Pashukanis, Christie is not a Marxist, nor does he demonstrate any knowledge of Pashukanis and his general theory of law. Yet, the theory of restorative justice which Christie propounds is, in many respects, remarkably affined to Pashukanis's position. Christie does not share Pashukanis's critique of the legal form. But he does show a strong intuitive grasp of the place of the process of commodification in the constitution of the legal form. Christie, it will be recalled, is concerned with criminal justice in 'industrialised large-scale society'. In other words, he is concerned with criminal justice in bourgeois

society. And he agitates for crimes in bourgeois society to be redefined as forms of property. Since bourgeois society is a society of generalized commodity production governed by the legal regime of private property, it follows that Christie's argument that criminal conflicts be comprehended as property forms is, in fact, an argument for their commodification.<sup>181</sup>

Christie embraces the process of commodification as his basic theoretical premise. According to him, restorative justice must be theorized in terms of the extension of the process of commodification to criminal behaviour itself. Crime is, or must become, a commodity. Of course, Christie would likely reject as absurd any suggestion that his advocating for crime to be treated as property implies that he supports the viewpoint of Pashukanis. What is indubitable, however, is that Christie's theoretical submissions confer credence upon Pashukanis's general theory of law, and place restorative justice squarely within the purview of that theory. Christie's work is primarily about grounding restorative justice theoretically. However, in his elaboration of a theory of restorative justice he grasps the truth of Pashukanis's essential argument - that legal relations are the superstructural manifestation of commodity relations, and that the legal form is, at bottom, a proprietary form which is suffused with the ethos of the market.<sup>182</sup>

Indeed, and despite their quite contrary origins and conclusions, Christie's idea of criminal conflict as property is a quite stunning vindication of

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181 See Pashukanis op cit 126: 'Private property first becomes perfected and universal with the transition to commodity production, or more accurately, to capitalist commodity production.'

182 The organic relationship between law and property seems to have been apparent to most earlier political philosophers. Thus, for example, Bentham (cited in Weitekamp, 1999: 88) says: 'Property and law are born together and die together.' The arguments of both Christie and Pashukanis are thus well-grounded in the history of political philosophy.

Pashukanis's analysis of the legal form.<sup>183</sup> The criticism of Pashukanis by neo-Marxists notwithstanding, in Christie we see a respected member of the non-Marxist criminological community proffering an analysis of crime and punishment which is spontaneously but uncannily Pashukanian in its essentials. And it is an analysis which has been validated by a significant proportion of the restorative justice community.<sup>184</sup> After Christie, the argument that Pashukanis's approach to law is too abstract or formal can no longer be entertained as serious criticism. Christie's achievement is that he discerned that the crisis of criminality had its material basis in the crisis of capitalism and fashioned a theory which comprehended the pivotal position occupied by proprietary relations in the political economy of capitalism. His achievement is all the more impressive in that he reached his conclusions - demonstrably Pashukanian in so many respects - without, it would appear, any conscious reliance upon the analytical resources of Marxism.

Christie's accord with the Pashukanian perspective encompasses not only the concept of crime but also that of punishment. Although *Conflicts as Property* contains nothing of substance in respect of the analysis of punishment, Christie's subsequent *Limits to Pain* makes it clear that he understands the principle of equivalent requital which founds the bourgeois penal regime. Thus, he says:

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183 There are, of course, major differences between Pashukanis and Christie, which will be discussed below.

184 See Wright (1991: 54): 'Few contributions have been as widely quoted in the literature on mediation as the Norwegian Professor Christie's lecture in Sheffield in 1976, *Conflicts as property*.' See also Johnstone (2003: 24): 'Christie's paper is rightly regarded as essential reading for anybody wishing to understand the restorative justice perspective.' Hudson (2003: 177) refers to 'Christie's classic article' as 'paradigmatic', and Braithwaite (cited in Bottoms, 2003: 80) considers it 'the most influential text of the restorative tradition'. Bottoms (2003: 82 & 80 footnote 2) refers to it as 'this key foundational text' and informs us that: 'The subsequent major influence of Christie's paper would have been predicted by very few of those who first heard it. It was initially regarded as an extremely interesting intellectual argument, but one that was unlikely to have much subsequent practical impact. How wrong first impressions can be!'



‘In penal law, values are clarified through a gradation of inflicting pain. The state establishes its scale, the rank-order of values, through variation in the number of blows administered to the criminal, or through the number of months or years taken away from him.’<sup>185</sup>

He understands also the connection between punishment and the commodity economy as an economy of labour time:

‘It is correct that our prisons are by and large filled with poor people. We let the poor pay with the only commodity that is close to being equally distributed in society: time.’<sup>186</sup>

Christie clearly appreciates the true meaning of the notion of ‘doing time’. And again, as with his analysis of crime, his pronouncements on punishment have about them a palpably Pashukanian tenor.

It is well known that in their studies of the constitution of the primitive commune, Marx and Engels relied heavily upon the anthropological discoveries of Morgan.<sup>187</sup> Similarly, Lenin, in his analysis and critique of imperialism, made extensive use of the work of Hobson.<sup>188</sup> Although Pashukanis was murdered forty years before Christie’s 1976 lecture, Christie occupies a position in relation to Pashukanis which is in many respects comparable to that occupied by Morgan in relation to Marx and Engels and Hobson in relation to Lenin. Certainly, it would not be inappropriate to say of Christie that in his analysis of restorative justice, he

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185 Christie (1981: 94).

186 Ibid 95.

187 In the Preface to his *The Origin of the Family, Private Property and the State*, Engels (1940: 1) tells us that Morgan ‘in his own way had discovered afresh in America the materialistic conception of history discovered by Marx forty years ago’. Also, in 1884 Engels (cited in Terray, 1972: 21) wrote to Kautsky that: ‘Within the limits set by his subject, Morgan spontaneously discovered Marx’s materialist conception of history, and his conclusions with regard to present-day society are absolutely communist.’

188 In his *Imperialism*, Lenin (1977: 176, 235 & 240) often praises ‘the non-Marxist Hobson’, whose work he accepted as presenting ‘a very good and comprehensive description of the principal specific economic and political features of imperialism’. The Bolshevik leader put greater store by Hobson’s analysis of imperialism than that of Marxists such as Kautsky and Hilferding.

rediscovered the core elements of Pashukanis's materialist theory of law. It would, similarly, be entirely legitimate to say that the non-Marxist Christie's comprehension of the constitutive features of the legal form is superior to that of avowed Marxists such as Fine and neo-Marxists such as Warrington.

When Christie conceptualizes crime as a form of property, he is commodifying it. Pashukanis discerned virtually the same thing some 50 years earlier, in his classification of a crime as a retrospective contract. For, inscribed in such a classification is the notion of an exchange relation which lies at the heart of the juridical idea of a contract. In other words, Pashukanis realized that, in the capitalist context, a crime is as much about commodity exchange as any other private-law contract. Given that the commodity is the elemental form of capitalist property, it becomes patent that Pashukanis adhered to a decidedly proprietary notion of crime. Almost half a century had to elapse before this Marxist discovery was publicly affirmed by an 'independent' source in the shape of Christie's decidedly non-Marxist theory of restorative justice. It would appear that all roads do, after all, as MacPherson would have it, lead to property. That is the capitalist way.

The Christie thesis lays to rest, and definitively, all notions that Pashukanis's analysis of crime and punishment in terms of commodity exchange is somewhat farfetched, abstract and contrived. There can no longer be any serious or sustained argument that while Pashukanis's theory of law may be able to explain private law adequately, it cannot do the same for public law. Nor can it any longer be contended that his theory does not qualify as a general theory of law. Christie has, in this regard, proved Pashukanis. His theorization of restorative justice has confirmed that Pashukanis's theory of law is properly general, in the sense that its application to criminal justice is as valid, at least, as its application to the law of contract. When Christie decided to theorize crimes as

forms of property he was, needless to say, unaware of how close this would take him to Pashukanis. It took him as close as a non-Marxist can approach a Marxist position without actually embracing it. The proximity is such that the spirit of Pashukanis's general theory of law is embedded in the soul of Christie's proprietary theory of restorative justice.

Christie appreciates the proprietary bias of contemporary bourgeois society and celebrates it as the cornerstone of the theory of restorative justice. As a Marxist, Pashukanis's comprehends fully the centrality of property in the political economy of capitalism, and theorizes it, in its unadulterated commodity form, as the key to the analysis of the legal form. There can, in this regard, be no gainsaying the likelihood that, had Pashukanis been required to analyse restorative justice in his day, he would have done so in terms not unlike Christie's. Of course, he would have given the analysis an expressly materialist colour, but he would almost certainly have left Christie's fundamental theoretical insights largely intact. The focus would have been upon incorporating, extending and deepening the Christie thesis in terms of the Marxist method rather than upon dismissing it for its non-Marxist genesis. The Marxist theory of law takes the commodity as its premise and comprehends legal relations as the form necessarily taken by commodity relations, and the legal subject as the necessary *alter ego* of the commodity owner. It is, in this connection, indisputable that Pashukanis would have comprehended restorative justice in proprietary terms. He understood crime and punishment as exchange transactions and would invariably have applied this insight to the analysis of restorative justice. Of course, the commodity is at the heart of every exchange relation and would have had to be central to the Marxist comprehension of restorative justice also.

However, the Marxist critique of restorative justice in a capitalist context does not imply that Marxism is blind to the liberatory potentialities of restorative justice in a post-capitalist milieu. It is, in this regard, instructive to consider briefly the revolution in law which took place in the first decade or so of Bolshevik rule in the Soviet Union. It was a revolution which was informed by the commodity exchange theory of law,<sup>189</sup> and which had Pashukanis and Stuchka as theoretical doyens. Bolshevik jurists understood that the Soviet Union was a proletarian dictatorship, that is, a transitional form of state between capitalism and communism. And in the same way as the proletarian state was expected to wither away as the classless society approached, so too was the law of the transition period expected to wither away.<sup>190</sup> Communism, then, would be 'lawless', in the sense that the very notion of law would have been rendered a historical and institutional anachronism.<sup>191</sup> The Bolshevik jurists were tasked with the responsibility of formulating a legal regime which expressed the requirements of the transition period.<sup>192</sup> While they accepted that the period would have a juridical character, they conceived of the juridical itself in transient and disintegrative terms. Certainly, they recognized no obligation to respect the relationship between the commodity and legal forms which, in terms of the

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189 See Rosenberg (1990: 153).

190 The nature of this transitional law was the subject of constant debate within Bolshevik legal ranks in this period. Pashukanis insisted that it was bourgeois law on the basis that the transitory nature of the dictatorship of the proletariat rendered the idea of proletarian law totally untenable. Stuchka (1990a: 159-161), by contrast, accepted that the law of the transition was proletarian law. Stuchka's view eventually prevailed. See Warrington *op cit* 59-60 and Berman (1963: 28).

191 See Pashukanis *op cit* 61: 'The withering away of certain categories of bourgeois law in no way implies their replacement by new categories of proletarian law ... The withering away of the categories of bourgeois law will, under these conditions, mean the withering away of law altogether, that is to say the disappearance of the juridical factor from social relations.' See also Stuchka (cited in Berman *ibid* 26): 'Communism means not the victory of socialist law, but the victory of socialism over any law, since with the abolition of classes with their antagonistic interests, law will die out altogether.' See further Kozlovsky (1990: 171): 'With the final suppression of the bourgeoisie, proletarian "law" will gradually lose its own functions and will be changed into rules for the organization of economic life – production, distribution and consumption. Organs of law will be turned into economic and administrative organs.'

192 See Berman *ibid* 29, Schlesinger *op cit* 156 and Rosenberg *op cit* 154-155.

commodity exchange theory, constituted the juridical moment. Indeed, inasmuch as the Bolsheviks were theoretically committed to transcending the juridical, they were also practically disposed to subverting the legal relation. The revolution in law over which they presided was, in this regard, fundamentally destructive of bourgeois legality and its institutional apparatus.<sup>193</sup>

The Bolshevik revolution in law included a profound transformation of the criminal justice system. In this connection, the first step of the revolutionary regime was to dismantle the pre-revolutionary courts and replace them with People's Courts.<sup>194</sup> These new courts had jurisdiction over most crimes, except crimes of counter-revolution which fell within the province of Revolutionary Tribunals. They were staffed by elected personnel: a President (usually a legal professional) and two or more lay People's Assessors. The latter had the same rights as the President in matters of fact and law, and also had the power to remove him. People's Courts were enjoined to have recourse to pre-revolutionary laws only insofar as they had not been abolished and did not contradict revolutionary conscience and consciousness.<sup>195</sup> For Stuchka this injunction was a proclamation of 'class principles of justice'.<sup>196</sup> These principles entailed a rejection of the formalism characteristic of bourgeois rules of evidence and procedure. Such matters were secondary to the task of finding ways, including the

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193 See Rosenberg *ibid* 156 and Berman *ibid* 32.

194 This was achieved by way of the Decree of the Soviet of Peoples's Commissars on the Court of November 1917. See Stuchka (1990b: 185), Schlesinger *op cit* 62 and Butler (2003: 149).

195 Article 5 of the Decree of the Soviet of Peoples's Commissars on the Court. For further discussion of the People's Courts and Revolutionary Tribunals see Berman *op cit* 31, Stuchka *ibid* 187-189, Butler *ibid* 149-150 & 577-588 and Schlesinger *ibid* 60-73.

196 Stuchka (1990c: 193).

consideration of non-legal issues, to resolve the case according to socialist criteria of justice.<sup>197</sup>

The punitive policy of the transition was intended to 'break completely with the principles of retribution'.<sup>198</sup> Instead, the purpose of punishment was to be social defence, that is, the defence of the revolutionary social order against criminal encroachments.<sup>199</sup> The type and scale of punishment depended upon the extent of 'the degree and character of the danger for society of both the criminal himself and the act'.<sup>200</sup> The class position of the offender was identified as the primary factor in determining punishment.<sup>201</sup> Early Bolshevik criminal justice was thus expressly class-based, breaking decisively with the principle of equivalence which had informed the pre-revolutionary dispensation.<sup>202</sup>

The constitution and operation of the revolutionary courts outlined above evince a discernible restorationist flavour.<sup>203</sup> Elements such as significant lay participation and powers, the rejection of retribution as the purpose of punishment and the ready reliance upon extra-legal factors in the resolution of legal disputes

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197 See Rosenberg (op cit p157): 'Procedures governing the relevance of evidence and testimony were also altered to allow the introduction of wide-ranging material concerning social background, political attitudes, character and the like.' See also Schlesinger (op cit 72): 'Not in elaborate legal machinery but in thorough investigation of all relevant circumstances of the case is Justice sought.'

198 Kozlovsky op cit 173.

199 See Articles 8 and 10 of the Guiding Principles of Criminal Law in the RSFSR (1919).

200 Article 11 of the Guiding Principles of Criminal Law in the RSFSR (1919).

201 Article 12 (a) of the Guiding Principles of Criminal Law in the RSFSR (1919). See also Schlesinger op cit 75.

202 See Kozlovsky op cit 176: 'The mathematically exact yardstick "from-to", adopted by bourgeois legislators, rests on the fiction of a "normal", "average person" ... Proletarian justice does not need fictions for concealing its class character, as does the bourgeoisie, and does not operate with a fictitious "median", lacking correspondence to a living and diverse reality. Proletarian justice, guided in the defence of the socialist system only by the principle of expediency, grants a free hand to its courts in calculating the amount of repression, in accord with the diversity and many-sidedness of criminal activities.'

203 I must thank Professor Piers Beirne, one of my examiners, for drawing my attention to the potential affinity between early Bolshevik criminal justice and restorative justice.

may all be comprehended as prefigurations of restorative justice. To be sure, Bolshevik criminal justice, as the criminal justice of the dictatorship of the proletariat, was eminently statist. But it also presaged the justice of a future communist society in which the state, as an institution of class rule, had withered into insignificance. The Bolshevik innovations in criminal justice portended a restorative justice which transcended the commodity form and its attendant principle of equivalence. Pashukanis's general theory of law not only contains the conceptual necessities for the Marxist critique of contemporary restorative justice, but also formed the theoretical backdrop to an incipient post-capitalist restorationism inscribed in the Bolshevik revolution in law.

### 5.13 Pashukanis *contra* Christie

Despite their mutualities, there remains a series of unbridgeable differences between Pashukanis and Christie. The divergences between them stem directly and inevitably from the fact that the former is a Marxist and the latter not. And they traverse the core elements of the Marxist critique of restorative justice. There are three such items of difference which require comment.

The first major difference concerns the legal form itself. Notwithstanding its centrality to his general theory, Pashukanis is an unrelenting critic of the legal form and theorizes its eventual disappearance from human relations, along with the commodity form. For him the key to the comprehension of both forms and of the relationship between them lies in their historicity. The lives of both are intimately connected with the life of the capitalist mode of production, and their demise is expected to follow the demise of capitalism. Pashukanis considers that law proper is a bourgeois relation and he looks forward to the installation, in the wake of the emergence of a post-capitalist social order, of a world in which the

legal form has no purchase, one in which human relations are not structured by the juridical perspective. In other words, he anticipates that the next historical era in the evolution of human society will be a post-legal one.<sup>204</sup>

Christie, by contrast, is an unapologetic believer in the notion of the juridical, and takes the legal form for granted as an aspect of human relations. What is more, his position entails the re-conceptualization of criminal law as a direct materialization of the commodity form, from which is derived the legal form. His submission that criminal conflicts are forms of property amounts to an argument for the commodification of crime and punishment. Indeed, it is an argument for intensifying the process of commodification, with a view to transforming the criminal law landscape so that the interrelation between the legal form and the commodity form is unequivocal. This is the juridical approach *par excellence*. However radical Christie may be in relation to the conventional notion of criminal justice, such radicality does not extend to the legal form itself. He presumes its permanent existence. The question of the historicity of the juridical is outside the ambit of his theory. The future of the legal form does not feature in his theoretical constructions. This is a crucial omission which, as will become clear later, imports into the restorative justice project a quite disabling contradiction.

The role of the state, as a public power, is the source of the second major difference between Pashukanis and Christie. Pashukanis analyses the criminal law as a branch of public law which is premised as securely, if not as obviously, as private law upon the exchange transactions of the commodity economy. He seeks to explain criminal justice on the basis of his general theory of law. He

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204 For Pashukanis (op cit 133), 'the legal form only encompasses us within its narrow horizon for the time being. It exists for the sole purpose of being utterly spent.'



attempts to theorize the criminal law, as a public law phenomenon, in terms of the relationship between the legal form and the commodity form. As a Marxist, Pashukanis comprehends the necessity for the state to administer criminal justice in class society in general and bourgeois society in particular. The public nature of crime and criminality is thus an issue for him only insofar as it needs to be harmonized with a theory of law which presumes the genesis of the legal form to be essentially 'private'. Pashukanis therefore takes as given the fact that the criminal law is public law, to which the state is necessarily a party. He accepts that in a commodity economy, criminal justice is perforce state justice. His concern is to develop his general theory from its origins in private law to encompass also those branches of the law which are generally accepted to be public, foremost amongst which is criminal law. In a word, Pashukanis's project in respect of crime and punishment is to discover and clarify the nature of the legal form, *qua* public law form, in the context of an economy of generalized commodity production.

It has already been established that Christie's theory of restorative justice is anti-statist. He wishes to remove the state from the criminal justice matrix by privatizing the criminal episode and establishing a patent link between the criminal law and the commodity form. Indeed, he appears to believe that, hitherto, crime and punishment have been insufficiently commodified and hence that the legal form has not reached the level of development in the criminal law that it has in the different branches of private law, such as the law of contract, the law of delict and the law of property. A state-sponsored criminal justice system is considered by restorationists to be an impediment to the resolution of the crisis of criminality. Hence Christie's advocating that the legal relations governing crime and punishment be removed from the public arena and relocated in the private arena. If restorative justice is to be the key to solving the crisis of criminality,

then the key to restorative justice is the complete privatization of crime and punishment, in the sense that the state has no say in the disposition of criminal matters.<sup>205</sup> This, of course, implies a radical break with criminal justice. It is his strident anti-statism which separates Christie's restorative justice from conventional criminal justice (and from partial restorative justice). However, as will be argued later, it is this self-same anti-statism which constitutes perhaps the biggest obstacle to the success of the restorative justice project.

Christie's anti-statism rests upon the twin legs of the commodity and the community. For criminal conflicts to become property which can be disposed of according to the will of their owners, they must, of necessity, be transformed into commodities. When Christie agitates for a world of property owners he is therefore agitating for a world of commodity owners. In such a world, the crime becomes a commodity in the hands of its co-owners, the offender and the victim. In concert, they work out an exchange, according to which the offender will make the reparation required and the victim will accept such reparation as will allow them to relinquish ownership. They are equal participants in an exchange relation which consumes the crime. The exchange has the effect of using up the criminal episode. Things can then return to normal. And the principle of equivalence stands vindicated.

While Christie's theory does entail a privatized system of restorative justice it does not envisage that the exchange transaction which disposes of the crime be exclusively private as between victim and offender. The theory requires a third party or 'stakeholder', in the form of the community as the site of the transaction between victim and offender. The property owners must face each other in the

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205 Restorationists appear to embrace the privatized notion of crime in the same way that Thompson (1975: 266) embraces the public notion of human rights, that is, as an 'unqualified human good'.

community. They must make their dealings subject to the inspection and involvement of the community. The community is, in this regard, the guardian of the principle of equivalence in the restorative process. Its participation ensures that the transaction between offender and victim is an equal one. The restorative process needs a milieu in which the parties will respect each other as equals. The community provides that milieu.

It must be noted that Christie does not conceive of the restorative community as a 'mere' replacement for the state. His theory is properly anti-statist and allows no room for a public authority of any kind. It is true that community involvement imbues the restorative process with a public aspect, in the sense that it is open to public scrutiny. But that is not the same as having criminal dispositions decided by a public authority. Indeed, community participation in the restorative process is supposed to be an expression of the radically private character of that process. The community is able to become involved precisely because the state, as public power, has been ejected. If crime and punishment are commodities which, like all commodities, are exchanged in the market, then the community is the marketplace of restorative justice. It is the site where victim and offender, as men or women of property, as commodity owners, enter into an exchange transaction governed by the principle of equivalence according to which the market is structured. In this regard, the community is, to mangle Marx, a veritable Eden of equality.

Restorative justice seeks to go beyond criminal justice. It seeks to establish a true market in criminality, operating according to the laws which govern the market in commodities. Such a market is, archetypally, a private sphere, where participants meet as and are recognized as equals. In other words, the principle of equivalence is not imposed, as it is by the state in the arena of criminal justice. Here it is an attribute of the restorative process. That process summates in the

restorative sanction, which is supposed to express the principle of equivalence upon which restorative justice rests. Unlike the criminal sanction, it is not decided or fashioned by one party.<sup>206</sup> It is a solution devised by victim and offender, facing each other as equals in the community.

For Christie the restorative sanction is conceived as the end result of the process of equalization which the parties undergo. It is they, not the state, who decide what the *quid pro quo* for the harm suffered by the victim should be. The restorative sanction is the outcome of a transaction which occurs according to market principles. The parties negotiate, as equals, and settle upon the restorative sanction as the best and most fair result of their negotiations. Unlike the criminal sanction which is foisted upon the offender by the state,<sup>207</sup> the restorative sanction emerges naturally from an exchange between parties whose relationship is structured by the principle of equivalence. The criminal sanction is an enforced implementation of the ethos of the commodity economy whereas the restorative sanction is a celebration of that ethos.

In sum, Christie's project in respect of crime and punishment is to theorize them as private interactions between property owners in the community. The crime becomes a commodity to be disposed of in the community marketplace. And state punishment gives way to the restorative sanction, representing the

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206 The criminal sanction amounts to an enforced equivalence, backed by the power of the state. As Pashukanis shows, it is the power of the state which stands behind the construction of the crime as a contract made by the offender, whether he intended it or not, and whether he wants it or not. It is in the face of the might of the state that the offender has no choice but to uphold his part of the bargain which he imposed upon the victim unilaterally.

207 Of course, here state coercion is deployed in defence of the principle of equivalence.

outcome of the exchange transaction between victim and offender, according to the principle of equivalence.<sup>208</sup>

Of course, as a Marxist, Pashukanis, too, is anti-statist. But whereas Christie objects to the state as a party to the criminal justice system, Pashukanis objects to its very existence as a public authority in human society. The one wants to restrict the ambit of state power; the other wants to destroy it. The one accepts bourgeois society but seeks to replace its criminal justice system; the other accepts the criminal justice system as a necessary aspect of bourgeois society but seeks replace that society.

The third significant divergence between Pashukanis and Christie concerns their approaches to the fundamental juridical notion of legal subjectivity. It will be recalled that Pashukanis seeks the genesis of legal subjectivity in the commodity economy, and specifically in the imperatives of commodity exchange. For him, the legal form is a homologue of the commodity form, the former being the ideal superstructural expression of the latter. Legal subjectivity is derivative. Its existence is stipulated by the exigencies of the commodity economy. The legal subject emerges as the actualization of the commodity owner. They are similar in form; but remain conceptually distinct, with the latter taking analytical precedence over the former. Besides being historically given, the contingent character of

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208 Like all proponents of restorative justice, Christie rejects retributionism. Indeed, antipathy to retributionism has acquired the status of an article of faith in restorationist lore. Yet, retributionism is the only conventional theory of punishment which embraces overtly the principle of equivalence, the self-same principle to which restorative justice is theoretically wedded. The restorative process and sanction are about restoring the *status quo ante*. Restorationists accept that, prior to the crime, the relationship between the offender and victim was one as between two equal legal subjects. In other words, equivalence is the norm, which the crime has disturbed and which the restorative process must reinstate. If retributionism is about equivalent requital, then restorative justice is about equivalent recompense. Thus, despite their supposed contradictions, there is much more that restorative justice shares with retributionism than the proponents of the former would care to admit.

legal subjectivity is prescribed also by the philosophical materialism which informs Pashukanis's general theory of law. Since the Marxist epistemology stipulates the juridical concepts to be superstructural categories, it follows that their analysis ought to proceed from the material conditions of their genesis and development.

Christie inverts Pashukanis, and hence the materialist premise. He begins with the legal subject and ends with the commodity owner. For him, legal subjectivity, if not a natural condition, is certainly a prior condition. The legal subject becomes a commodity owner by virtue of the commodification of the crime to which he is a party. The former determines, the latter is determined. Both victim and offender become owners because they are legal subjects. In other words, he proceeds from a presumption of legal subjectivity. Such a presumption is, of course, rank idealism. Restorationists, including Christie, are quick to proffer historical justifications for their project. Yet, they make no effort to uncover the historical origins of the foundational juridical concept. Christie, too, avoids this avenue of investigation and embraces the legal subject as a suprahistorical universal. That is nothing other than a variant of the idealist postulate.<sup>209</sup>

The triad of differences between Pashukanis and Christie discussed above may be summarized as follows:

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209 Christie comprehends the relationship between the legal subject and the commodity owner as an identity and not, as does Pashukanis, as a homology. He transforms the crime itself into property, thereby collapsing the conceptual distinction between legal subject and commodity owner. This theoretical construction entails the most complete unity of the legal subject and the commodity owner. The commodification of the crime melds the subjectivity and proprietorship of each party. These attributes become definitively fused in the restorative process, to spawn the perfect subject-owner, for whom legal subjectivity and ownership are conterminous. The ambit of the idealist postulate is thus extended, to include the immortality of the commodity.

- Christie embraces the legal form as a natural and inevitable dimension of human social organization, past, present and future; whereas Pashukanis comprehends it in historically specific terms, as an attribute of bourgeois society, and theorizes its eventual disappearance from human social intercourse.
- Pashukanis understands the state to be a necessary party to bourgeois criminal justice and hence that such justice is necessarily public justice; whereas Christie takes a robust anti-statist stance, and theorizes restorative justice as privatized justice. Christie advocates the demise of the bourgeois state as a 'stakeholder' in the criminal justice system; Pashukanis advocates the demise of the state as a social institution.
- Pashukanis derives legal subjectivity from the structure of the commodity economy, and hence the legal subject from the commodity owner; whereas Christie presumes the timeless legal subject and, in the conditions of 'industrialised large-scale society', seeks to re-make him as a proprietor, that is, as commodity owner.

As intimated earlier, these differences also range across the essential features of the Marxist critique of restorative justice.

#### **5.14 The Political Economy of Restorative Justice**

The material roots of the restorative justice movement are to be found in the economic crisis which has ravaged the capitalist world, more or less unabated, for the past three decades. The severity and depth of the crisis have given rise to the neo-liberal drive to unburden the state of the social and welfare responsibilities which it had to assume after the Second World War. Privatization is the watchword of this project, and is touted as the answer to public waste and bureaucratic inefficiency which supposedly underlie the crisis of capitalist profitability.

The neo-liberal project is about rejuvenating the free market, unencumbered by the 'dead hand' of public claims and responsibilities. Its proponents argue that private enterprise will achieve the levels of profitability and general prosperity which have hitherto evaded those who make public policy. The state and its agencies are perceived as impediments to the blossoming of the free enterprise system. Hence the neo-liberal credo that the state ought to step aside and leave the business of the economy to those who have their lives invested in making it functional. These are not salaried state officials, for whom economic concerns are little more than an item in a job description, but the entrepreneurs for whom the health of the economy and the stability of the social order are absolutely vital. They are the true believers in the goodness of capitalism as a people's mode of production.<sup>210</sup> In other words, from the neo-liberal perspective it is the private sector, not the public, which holds the key to the solution of the structural crisis of capitalism and to its expanded reproduction as a mode of production.

Restorative justice is the penological correlate of the neo-liberal economic vision. There is an undeniable correspondence between the crisis of profitability and accumulation besetting the economy and the crisis of criminality and penalty besetting the administration of justice. Restorative justice represents the incursion of the spirit of the market into the arena of criminal conflict. Whereas this arena has been an eminently statist one hitherto, the advocates of restorative justice have taken an expressly anti-statist position. For them, restorative justice is a sphere of privatized justice in which the state has no place. They view the criminal justice system as a state asset which needs to be privatized, as so many others already have been. Privatization is necessary because the state has been unable to

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210 The idea of popular capitalism does suggest a certain 'publicness'. However, it is a dimension which is entirely subsumed under the popular capitalist drive towards privatization. See Chapter Two above.



administer the criminal justice system ‘profitably’, and has earned but minimal returns upon its investments on the anti-crime *bourse*.

The restorationist argument is that the state has failed in its bid to solve or even manage the crisis of criminality which continues to run amok in most capitalist social formations, and now needs to hand it over to those who can. In this regard, restorative justice seeks to bring to criminal justice a remedy of the order which neo-liberalism has brought to the economy. A crucial feature of this remedy is the transfer of hitherto public assets to the private sector, and the import of the principles of the market into existing state institutions. Restorationists are the free-marketeers of the criminal justice system. They seek to sever the link between the state and criminal justice. They wish to remove criminal conflicts from the public sphere and reconstruct them according to the precepts of the private sector. They are convinced, more or less, that it is the entrepreneurial spirit which holds the answer to the world-wide crisis of criminality.

The restorationist antagonism to statist criminal justice is a radical one. Comprehensive restorative justice is the first and only criminological movement to advocate that the state be entirely ejected from criminal justice process. However, it is a localized radicality. It is concerned to re-organize the manner in which bourgeois society deals with crime. It proposes that such re-organization be founded upon the privatization of criminal justice, which, in terms of the proprietary approach pioneered by Christie, entails the extension of the process of commodification to the criminal conflict itself. In other words, restorative justice appropriates the defining form and process of the capitalist economy as its theoretical touchstone. What is more, it thereby also embraces the legal form which arises from the commodity form.

The restorationists may be true radicals in their rejection of a state-sponsored criminal justice and their agitation for a privatized restorative justice. However, they turn out to be true conservatives about the notion of the juridical which underlies both criminal justice and restorative justice. Restorationists relate to criminal justice in the same way as anarchists relate to bourgeois law. Pashukanis says of anarchists:

‘Whilst they do, of course, reject the external characteristic of bourgeois law - state coercion and the statutes - they preserve its inner essence, the free contract between autonomous producers.’<sup>211</sup>

Insofar, therefore, as its opposition to the state is a parochial one which never ventures outside the conceptual confines of the bourgeois worldview, the radicality of restorative justice is overwritten in reaction. The restorationist demand for the demise of criminal justice is simultaneously a vote of confidence in the perpetuity of the commodity and legal forms.

Even within the parameters of the juridical, the radicality of restorative justice soon runs aground upon the tenacity with which the state holds its position in the criminal justice system. There is here a debilitating contradiction between the theoretical premise of restorative justice and the nature of capitalist criminal justice, which has the effect of undoing the former. For it is a vain hope that, within the confines of the social relations of the capitalist mode of production, it is possible to construct a response to the problem of crime which does not rely upon state participation. Christie and his fellows do not understand that bourgeois criminal justice is necessarily state justice. Policing might be privatized. Corrections might be privatized. But, in the capitalist world, crime and punishment must remain public. They must retain their statist fundamentals. The regime of criminal justice as we know it is a thoroughly juridical regime, in the

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211 Pashukanis op cit 124.

Despite the intersections between the proprietary theory of restorative justice and the Marxist general theory of law, there remains an unbridgeable chasm between the two. Restorative justice is about harnessing the legal form to its cause to supersede the criminal justice system. Marxism is about confronting the legal form in order to supersede it. Restorative justice is about removing the state from its supervisory role in the criminal justice process. The Marxist analysis of law is about the total destruction of the bourgeois state (and the withering away of its proletarian successor). Restorative justice is about turning all of us into men and women of property. Marxism is about unrelenting struggle against the regime of bourgeois property. Restorative justice is about commodification. Marxism is the mortal enemy of the commodity economy.

When all is said and done, restorative justice will not supplant criminal justice. But it is not the Marxist critique of its theory which is the undoing of restorative justice. The social relations of production themselves constitute the insurmountable barrier to its success. The radicality of restorative justice dissipates in the face of bourgeois class power. That same power reduces Christie to a petite bourgeois revolutionary clinging to the vain belief that crime will disappear if only we were all to become proprietors, even if only formally. And the comprehensive restorative justice project ceases to be a viable alternative to criminal justice. Instead, it is broken up into so many discrete pieces, each operational only at the behest and under the auspices of the bourgeois state and its criminal justice system, but never combining into a restorative justice system. The only future for restorative justice within the parameters of capitalism is a partial one.

It remains to assess restorative justice in relation to the postmodern precepts which have come to be identified with contemporary or late capitalism. The idea of popular capitalism, canvassed in Chapter Two above, was part of an

ideological response to the economic crisis of the mode of production. The idea of postmodernism may be comprehended as popular capitalism extended to the superstructure as a whole. The next chapter thus seeks to interrogate the relationship between restorative justice and postmodernism.

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## CHAPTER SIX

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## Chapter 6: Restorative Justice and Postmodernism

Postmodernism is predatory. It has long superseded its origins in art, architecture and literary theory, and has wended its way voraciously through a large number of disciplines. It has conquered even the famously conservative defences of the law and has already begun to make a noticeable imprint upon the analysis of legal relations. Indeed, it has implanted a colonizing presence in the legal form. There are today not a few legal academics who challenge the perceived certainties of legal modernism and have begun subjecting law and justice to new and destabilizing interrogations through the postmodern lens.<sup>1</sup>

The postmodern invasion of law has now reached the gates of restorative justice. Legal analysts have begun to deploy some of the postulates of postmodernism in the comprehension and critique of restorative justice.<sup>2</sup> However, restorationists appear, for now at least, to have kept their distance from the postmodern allurements. There is no evidence of any widespread and overt reliance by the theorists of restorative justice upon the work of postmodern luminaries such as Lyotard, Foucault, Baudrillard, Derrida, Lacan and Barthes.<sup>3</sup> As a rule, its proponents do not claim inspiration for their commitment to restorative justice in the tenets of postmodernism or to be arguing from a consciously postmodern perspective.

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1 See, for example, Edgeworth (2003), Davies (1996), McVeigh (2002), Hunt (1990), Stacy (2001) and Feldman (2000).

2 See, for example, Edgeworth (2003), Thomson (1997) and Cunneen (2003). It is worth noting that Delgado (2000), a well-known postmodernist, has produced an analysis of restorative justice which reads like a modernist tract.

3 To my knowledge, Pavlich (2003 & 2004) is one of the few restorationists expressly to have incorporated postmodern principles into his writings, via the work of Derrida especially. I shall not engage Pavlich because he is concerned to use the resources of postmodernism to refine restorative justice, whereas I am concerned to criticize restorative justice as a postmodern phenomenon.

Most attempts to theorize restorative justice do not engage postmodernism, and it is rare for restorationists to acknowledge postmodern sources as authority for their arguments. The two movements are largely synchronous.<sup>4</sup> Yet, the advocates of restorative justice have, hitherto, not reciprocated the interest displayed by the postmodernists.<sup>5</sup>

### 6.1 Restorative Justice as Postmodern Justice

The divide between the restorative justice movement and postmodernism is, however, more apparent than real. Besides the obvious fact that they are contemporaries, there is enough constitutional intersection between them to justify restorative justice being theorized as a genus of postmodern justice, that is, as a form of criminal justice informed by the premises of a postmodern jurisprudence. There is a patent, almost natural, correspondence between postmodernism and restorative justice, in the sense that all the major tenets of restorative justice have a decidedly

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4 Postmodernism precedes restorative justice by at most a decade.

5 It is unlikely that the advocates of restorative justice are unaware of the tandem growth of a postmodern jurisprudence. The new tends to seek out the new and there is no basis upon which to suppose a restorationist ignorance of postmodernism. Certainly, it is unthinkable that the architects of a self-consciously new way of doing justice should be oblivious to the advent and advance of a self-consciously new way of comprehending the world, especially if this new way of comprehending the world has already infiltrated the critique of juridical relations. It may therefore be presumed that restorationists have not sought to harness the insights of legal postmodernism to their cause because they have chosen not to do so. It would appear that they consider an avowedly postmodern justification of restorative justice neither desirable nor necessary. The rationale for such a choice is difficult to discern. As will be argued below, restorative justice is indeed postmodern in many of its essential tenets. The explanation that comes to mind readily is that, in the change-resistant world of law, restorationists sought to avoid association with the excesses of postmodernism. Hunt (op cit) has postulated a 'big fear' in legal circles of postmodern relativism and nihilism. Perhaps restorative justice shares this fear.

postmodern flavour about them. And the language of postmodernism has begun to infiltrate the restorative justice lexicon.<sup>6</sup>

It is the argument of this chapter that the concordance between the two is neither episodic nor accidental. It is genetic. It is submitted that restorative justice is one of the many progeny of postmodernism. If, as Heartney puts it, postmodernism is modernism's unruly child,<sup>7</sup> then restorative justice is postmodernism's introverted child who is embarrassed by its parent's unruliness. Certainly, a postmodern jurisprudent would be hard-pressed to construct a postmodern criminal justice that is not also fundamentally restorationist in character. In other words, if there is a postmodern criminal justice, it is restorative justice. The rest of this chapter is thus devoted to a critical explanation and exploration of restorative justice as a postmodern presence in the criminal justice system.

## 6.2 The Ambit of the Investigation

Postmodernism is notoriously resistant to definition,<sup>8</sup> as befits a worldview which celebrates relativism and leads the charge against essentialism and truth-talk. The postmodern perspective is a hold-all one, committed to indeterminacy and dislocation, and suspicious of the perceived tyrannical propensities of certainty. It would appear that, in postmodern terms, the pursuit of definition is an exercise in exclusion and, ultimately, oppression. It entails a temptation to acquiesce in the

6 See, for example, Toews & Zehr (2003: 261-264) who posit that justice is not 'a generalizable experience' and argue for 'multiple perspectives on a crime event' and hence for 'multiple interpretations of the same event'.

7 Heartney (2001: 6).

8 See Heartney *ibid*: 'Like the concept of a God who is everywhere and nowhere, "postmodernism" is remarkably impervious to definition.' See also Hutcheon (1988: 3)



follies and dangers of the metanarrative, towards which, as Lyotard so famously pronounced, the postmodernist is incredulous.<sup>9</sup> To be a postmodernist is to reject totalization. And it would be, as one commentator suggests, ‘very unpostmodern’ to attempt to impose order by way of a single definition.<sup>10</sup> Hence, the eclecticism, anarchy, ephemerality and fragmentation which mark the postmodern adherence to a plurality of perspectives. Hence, too, the difficulties of approximating the reality of postmodernism definitionally.

No attempt will therefore be made here to produce a conventional definition of postmodernism. Suffice it to say that this chapter considers postmodernism to be the worldview that corresponds to postmodernity, and that postmodernity is the political economy of the historical era constituted by the current conjuncture (which began in the early 1970s) of the capitalist mode of production. As a mode of production, capitalism is in historic decline. It is in the grip of a structural crisis of capital accumulation which goes to the vital issue of its reproduction as a mode of production. Postmodernism is the intellectual-*cum*-cultural mood accompanying the contemporary stage of the capitalist crisis. It is the economic crisis expressed in non-economic terms. It is the generalized superstructural conjugate of the material contradictions embedded in the marrow of the capitalist mode of production.<sup>11</sup>

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9 Lyotard (1992: 138): ‘Simplifying to the extreme, I define postmodern as incredulity toward metanarratives.’

10 Liebenberg (1988: 274).

11 The relationship between postmodernism and capitalism is crucial to the analysis undertaken in this chapter, and will be revisited for critical purposes later.

Certain commentators have, sensibly, avoided the problem of definition and analysed postmodernism in terms of its prominent principles or themes. For example, Sardar has produced six general principles<sup>12</sup> and Liebenberg has identified three dominant themes<sup>13</sup> of postmodernism, while Feldman has settled upon eight themes of postmodern jurisprudence.<sup>14</sup> This chapter will follow their lead. It will thus seek to illuminate the relationship between postmodernism and restorative justice by way of an analysis of a set of six theses, derived from and structured according to the materialist premise outlined in the previous paragraph.

The discussion which follows makes no attempt to be comprehensive. Certainly, it does not purport to be a definitive exposition of the postulates of postmodernism. The aim is much more modest, namely, to identify and engage those aspects of postmodernism which seem pertinent to the analysis of restorative justice as a postmodern way of doing justice. Thus, the precepts of postmodernism which are singled out for analysis below are those which appear to be most helpful in tracing the intersections between postmodernism and restorative justice. They are not presented as any finished description of postmodernism, and even less as any catholic elaboration of the constitution of postmodernism.<sup>15</sup> In other words, the six theses in

12 Sardar's (1998: 8-11) six principles of postmodernism are: 1. rejection of modernism; 2. denial of reality; 3. dominance of the simulacrum; 4. meaninglessness; 5. doubt; 6. embracing variety and plurality.

13 Liebenberg's (op cit 274-275) three dominant themes are: 1. suspicion of metanarratives; 2. fictionalization of reality; 3. embracing mass culture.

14 Feldman's (op cit 162-187) eight themes of postmodern legal thought are: 1. rejection of essentialism and foundationalism; 2. defiance of certainties, inveteracies, edifices and boundaries; 3. celebration of paradoxes; 4. decentralization of power; 5. the social construction of the subject; 6. self-reflexivity; 7. use of irony; 8. political ambivalence.

15 Such an attempt would, in any event, probably be futile. In 1991 Wicke (cited in Freeman, 2001: 1254) identified more than 30 varieties of postmodernism. That number would have increased substantially since. See also Rosenau (1992: 15): 'There are probably as many forms of post-modernism as there are post-modernists.' Given this plurality of postmodernisms, it is highly unlikely that any single analysis of postmodernism could be properly comprehensive.

question have been chosen, not because they delineate or even approximate the structure of postmodernism, but because they facilitate analytical access to the relationship between postmodernism and restorative justice. That is, they offer crucial insights into the comprehension of restorative justice as a postmodern jurisprudence.

The chosen theses were identified by a process of abstraction. As a methodological strategy, abstraction necessarily entails a certain simplification, in the sense that non-essential matters are sidelined analytically and the focus is upon constituent relations.<sup>16</sup> Abstraction is thus a ready target for a charge of omission. Such a charge is especially attractive in respect of postmodernism, which has acquired a reputation for complexity and contrariness. It may be owned that the process of abstraction is a limiting one, which sacrifices at least some of the heterogeneity of postmodernism.<sup>17</sup> However, such a sacrifice is unavoidable if the postmodern impulse of restorative justice is to be laid bare to analysis in historical materialist terms. The chosen theses may not capture all the intricacies of 'the postmodern condition' as represented and understood by the proponents of postmodernism. It is submitted, however, that they do suffice for the task at hand, which is to interrogate the relationship between postmodernism and restorative justice.

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16 See Chapter One and Chapter Five above for more detailed consideration of the process of abstraction. See also Lash (1990: 3).

17 Abstraction is a methodological necessity. In the Marxist canon, it is not a stratagem to render the object of analysis an easy theoretical 'mark'. Rather, it is a strategy to facilitate analysis by bringing the object into sharp theoretical relief, unencumbered by paltrinesses.

It needs to be emphasized also that the discussion below is not an attempt to theorize postmodernism in general.<sup>18</sup> There is, in this regard, a crucial difference between theorizing postmodernism and theorizing restorative justice as a juridical expression of postmodernism. The former would necessitate an account which is comprehensive theoretically, regardless of the perspective of the theorist. For the latter a narrower focus upon the interrelations between restorative justice and postmodernism is sufficient. It bears reiterating that this chapter is concerned with the latter. Hence the somewhat circumscribed ambit of the discussion which follows, encompassing only those features of postmodernism which contribute to illuminating its relation to restorative justice.

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18 The construction of a theory of postmodernism is both beyond the purview of this dissertation and is not required for the purposes of this chapter. In any event, postmodernism has been theorized comprehensively in Marxist terms by analysts who are far more qualified to do so than I am. I refer here to the work of such Marxist theorists as Harvey, Jameson, Callinicos and Eagleton. Insofar as I engage postmodernism as a general social and cultural form, I do so almost entirely on the basis of their insights. As will become apparent later, I consider Harvey's to be the most consistent and convincing Marxist theory of postmodernism.

### 6.3 Six Theses on Restorative Justice and Postmodernism

It is submitted, then, that the following six theses are germane to the comprehension of restorative justice as a postmodern critique of the modern sensibilities founding the criminal justice system. Each thesis will begin with an exposition of the basic postmodern position on the issue in question and then attempt to demonstrate that restorative justice shares the essentials of the postmodern position.<sup>19</sup>

#### 6.3.1 Thesis 1: The State

Postmodernism posits the decline of the nation-state in the face of the globalization of capital. The argument is that the postmodern world is a world of autonomous subjects, in which there is little room for the strong state of the modern era. Edgeworth characterizes the postmodern state as a contracting state. This characterization has a dual import. On the one hand, it refers to the retreat of the state as a public institution and the diminution of its traditional determining role in structuring the lives of its citizens. On the other hand, it signifies the increasing

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19 It is appropriate to note here that postmodernism is discursively hyperbolic. Extravagant notions such as hyperreality, pastiche, hyperspace and simulacrum are all integral to postmodern discourse. And postmodernists present their arguments in similarly exaggerated terms. Thus, for example, Best & Kellner (2001: 1-2) describe the postmodern era as one of 'vertiginous change', 'surprising novelties', 'turbulent transformations' and the like. See Rosenau (op cit: 5 & 7), who characterizes the postmodern approach as 'flamboyant' and notes: 'Postmodernists in all disciplines reject conventional academic styles of discourse; they prefer audacious and provocative forms of delivery, vital and intriguing elements of genre or style and presentation ... Such forms of presentation shock, startle and unsettle the complacent social science reader.' It is generally not possible to engage postmodernism, in any of its aspects or relations, without having recourse to and replicating some of its discursive conventions. If, therefore, parts of the presentation below strike the reader as hyperbolic, it is because hyperbole is intrinsic to the discourse of postmodernism.

privatization of public functions, as the law of contract is more and more relied upon in respect of both the provision of (whatever remains of) state services and the internal functioning of state departments.<sup>20</sup> Essentially, the postmodern state has reversed the modern trend to centralization and corporatism. It is a state for which, as Edgeworth notes, 'privatization, deregulation and marketization are the preferred mechanisms by which governance is secured'.<sup>21</sup>

The welfare state was the pinnacle of the evolution of the modern state. It was centralization and regulation epitomized, and, from the postmodern perspective, was the left liberal political metanarrative materialized. The postmodern state is defined by the neoliberal disavowal of the perceived welfarist errantry of left liberalism. The watchwords of neoliberalism are the self-same trilogy identified by Edgeworth as the preferred mechanisms of postmodern governance.<sup>22</sup> In other words, postmodernism champions the neoliberal drive towards the attenuation of all the welfare functions of the modern state. Postmodernism prefers the invisible hand of the free market to the visible hand the centralized state. Ideally, the postmodern state is an absentee state or, at least, a minimalist one, divested of many of its traditional functions, which become privatized in the hands of capitalist corporations.<sup>23</sup>

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20 See Edgeworth op cit 53-63.

21 Ibid 56.

22 But see MacEwan (1999: 19): 'Markets are always infused with state actions, and the neo-liberal position is not in reality an advocacy of a weak state; it is an advocacy of a particular kind of strong state.' This argument is amplified by MacEwan at 125-139.

23 Postmodernists tend not to notice that the minimalist state which they extol is often party to the commodification of properly public functions, and that such commodification is achieved at the cost of increased immiseration of the oppressed and exploited classes. It would appear that for them the freedom of the individual which such a state supposedly brings is valuable enough to offset the deleterious impact upon the living standards of the masses. Postmodernism is a profoundly individualistic worldview. The autonomy of the subject is a centrepiece of the postmodern project (in much the same way as it was the centrepiece of the modern project). The freedom of the individual which accompanies privatization is crucial. Its impact upon the living standards of the masses matters little.

The vision of the state held by postmodernism coincides with its rejection of the notion of the grand narrative which it considers to be the defining flaw of modernism. In this connection, the modern nation-state is perhaps the grandest of all narratives. It is a cohesive, centralized and authoritative institution, which is uniquely competent to implement and realize its own truth claims. It is omnipotent and, for as long as it enjoys a monopoly of force, is impervious to the claims of competitors within its national borders. Postmodernism entails the break-up of the modern notion of state supremacy. State power becomes fragmented and localized, and state authority, like everything else in the postmodern world, becomes negotiable. The status of the state, as narrative, is reduced from the grand to the quotidian. In the postmodern perspective, most, if not all, traditional state functions can be performed as well, if not better, by non-state actors.

Although it does not admit a postmodern derivation, restorative justice shares this vision of a minimalist or absentee state. Indeed, easily the most conspicuous property of comprehensive restorative justice is its anti-statism. Its project to replace criminal justice with restorative justice is simultaneously a bid to eject the state from all matters criminal. In the restorationist quest of a solution to the crime problem, the state is considered to be a hindrance which must be removed, lock, stock and barrel. Whether they are aware of it or not, or if they are aware, whether they own it or not, the proponents of comprehensive restorative justice are, in this regard, all decidedly postmodern in their fight for a fully privatized system of criminal justice. The same is true, *mutatis mutandis*, of partial restorative justice. Although its proponents have reconciled themselves to the continued supremacy of state criminal justice, they too advocate the withdrawal of the state from those areas of the criminal justice system into which restorative justice may be admitted. Both versions of restorative justice

thus embrace the postmodern argument for a minimalist or absentee state. Both believe that non-state actors are capable of solving, in whole or in part, the problem of criminality upon which the efforts of state agencies appear hitherto to have made little impact.

The intersection between postmodernism and restorative justice on the question of the state is extensive. Essentially, they are at one in their critique of the modern state in that both want an end of the state as the decisive authority and the political metanarrative. The anti-statism of restorative justice mirrors the postmodern assault upon the intrusive character of the modern state. Both the postmodernist and the restorationist advocate privatized relations to replace the current state forms. The restorationist critique of the state is thus indisputably infused with the ethos of postmodernism.

### 6.3.2 Thesis 2: History

Despite a reputation for being ahistorical,<sup>24</sup> postmodernists readily trawl the past for both inspiration and ammunition in their battle against the configurations of modernism. Historical references bulk large in the postmodern rejection of the perceived tyranny of the metanarrative. While such references are most evident in postmodern architecture and art, they form an integral facet of the postmodern project in most disciplines.<sup>25</sup> Indeed, it has been argued that postmodernism has embraced a 'return to history' and appreciates the ontological value of historical consciousness.<sup>26</sup>

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24 See Hutcheon op cit 87.

25 See Heartney op cit 12 & 20 and Hutcheon ibid 93.

26 See Hutcheon ibid 91-94.



Postmodern historicism is concerned primarily with excavating premodern social artefacts and organizational forms which may be enlisted in the battle against the supposedly totalizing machinations of modernism.<sup>27</sup> Postmodernists, following Lyotard, generally comprehend the premodern epoch in narrative terms, as opposed to the dreaded metanarrative.<sup>28</sup> The narrative model of knowledge accepts no fixed origin which structures the narrative, and refuses to grant the narrator autonomy from the narrative. It is a model which presumes narrator heteronomy and which values epistemological contingency.<sup>29</sup>

The postmodern commitment to the narrative tradition translates into a fascination with tribalism and localism as historical constructs. It is, more or less, already a postmodern conventional wisdom to quote the narrative devices of tribal societies which survive on the fringes of the contemporary capitalist world in Latin America, Africa and Asia. These societies are prehistoric in organization and technics, and are supposedly free of the metanarratives of the modern epoch.<sup>30</sup> This is why, for example, arguments for a postmodern re-organization of society invariably rely heavily on notions of independent crafts, cottage industries, parochial economies

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27 Of course, the postmodern recourse to premodern principles and concepts is a highly selective one. Invariably, the contradictions of the premodern world are avoided. The premodern epoch is wide. It spans both prehistoric and historic societies and includes at least two historical modes of production, namely, the slave and feudal modes. The cultural and other achievements of the ancients were based on slave labour. The attractions of localism and community harmony omit the feudal structures of exploitation and oppression which dominated the day-to-day existences of serfs and peasants.

28 See Edgeworth op cit 234.

29 See Davies op cit 68-70.

30 The postmodern faith in a prehistoric world free of the metanarrative is unsubstantiated. It has been established in Chapter Two above that custom was the grand narrative of the prehistoric world. The savage horde and the barbarian gens were totalizing institutions to the core. Contemporary tribal societies survive not only because they are geographically excluded from the reach of the capitalist mode of production but also because they are structured by their own metanarratives, arguably even more totalizing than those of modernism.

and yeoman democracy.<sup>31</sup> The idea is to exorcise the demons of modernism and rejuvenate the perceived idyll of premodern community.<sup>32</sup>

This premodern historical bias of postmodernism is an inevitability, more or less. History offers it only the choice between premodernism and modernism. And since postmodernism stands contrary to all that is modern, the choice is an illusory one. In other words, the postulates of premodernism are the only viable historical alternative to those of modernism. If, therefore, postmodernism seeks to validate itself historically, it is entirely logical that it should draw upon premodernism as its primary source of such validation. What is more, the premodern epoch has the added attraction of being more unequivocally past than the modern era. It is no longer a component of living memory and is thereby readily available for a postmodern makeover, literally.

As demonstrated in Chapter Two above, restorationists share the postmodern predilection for premodern historical justifications. Indeed, restorative justice is perhaps more strident in its reliance upon history to advance its cause.<sup>33</sup> The opposition between restorative justice and retributive justice has become firmly established as a restorationist article of faith. Retribution is portrayed as a modern response to crime which has no or little foundation in the history of punishment. Restorationists believe that the premodern world was, as regards penal sanctions, a

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31 See Kumar (1995: 48).

32 For a dissenting view, see Davis (1988b: 83-84): 'At least 100,000 apparel homeworkers toil within a few miles' radius of the Bonaventure [the Los Angeles hotel which has become a postmodern icon] and child labour is again a shocking problem. This restructuring of the relations of production and the productive process is, to be sure, thoroughly capitalist, but it represents not some higher stage in capitalist production, but a return to a sort of primitive accumulation with the valorization of capital occurring, in part, through the production of absolute surplus value by means of the super-exploitation of the urban proletariat.'

33 Certainly, restorative justice does not share the postmodern reputation for being ahistorical.

world of restorative justice. Thus, Christie relies heavily upon the justice regime of premodern African tribes as the basis for his proprietary theory of restorative justice. Similarly, the republicanism espoused by Braithwaite & Petit is rooted historically in the premodern Roman notions of *libertas*, *civitas* and *dominium*.<sup>34</sup> Other restorationists such as Zehr and Consedine concur with the view that the premodern era was, more or less, a golden era of restoration in the history of criminal justice.<sup>35</sup>

Restorationists identify retribution with large-scale industrial society. In other words, they conceive of it as the penal regime of the modern capitalist world. But they are adamant that retributive justice is neither the natural nor the necessary response to the problem of criminality. For them, restorative justice is not only the aboriginal but also the more natural way of doing justice. It was the justice of preindustrial, tribal, small-scale societies, and, as such, was the archetypal premodern form of justice. And it was successful in keeping the premodern world free of the kind of rampant criminality in which every modern society has been languishing for decades. As the paradigmatic modern approach to punishment, retribution has allegedly brought about its own demise by its signal failure to make any significant impact upon the contemporary crisis of criminality. Hence restorationists argue for its replacement by restorative justice which, they contend, has become necessary because it alone possesses the radical vision required to resolve the crisis.

If retribution is the exemplar of the modern way of doing justice, then there can be little doubt that restorative justice is the prototypical postmodern approach to justice. It defines itself in terms of its opposition to retribution and considers itself to

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34 See Chapter Four above.

35 See, for example, Zehr (1995: 95-157) and Consedine (1999: 10-11 & 80-96).

be imbued with the palliative and regenerative powers of its premodern pedigree. From the postmodern perspective, retributive justice is a version of the modern metanarrative whereas restorative justice is imbued with the spirit of the premodern narrative. And the key to overcoming the tyranny of the former is to revert to the freedom of the latter. Restorative justice and postmodernism are evidently coeval in their partiality to the supposed emancipatory promise of the premodern narrative.<sup>36</sup>

### 6.3.3 Thesis 3: Alterity

Derrida's notion of *différance* has inspired a postmodern pre-occupation with alterity.<sup>37</sup> It is a preoccupation which has resulted in the idea of the Other becoming generally acknowledged as one which is 'crucial to any discussion of postmodernism'.<sup>38</sup> Such a focus upon alterity is concerned to engage and thereby to foreground the traditional outgroups which have been marginalized by the modern metanarrative. Women, people of colour, homosexuals, indigenous populations, the disabled and the aged - these are the Others, ostracized and silenced by modernism, with whom postmodernism has chosen to identify. A large part of the postmodern

36 According to Van Ness & Strong (1997: 76-77), narrative is a 'personalized approach' which does 'not attempt to generalize or universalize'. Instead, 'the parties talk to one another; they tell their stories. In their narrative they describe what happened to them and how that has affected them, and how they see the crime and its consequences'. Narrative has gained a strong foothold in restorative justice. Prominent restorationists such as Van Ness & Strong (at 3-4), Zehr (ibid 15-18), Consedine (ibid 9-10) and Braithwaite (2003a: 54-55) routinely incorporate restorative narratives into their work. In other words, they adopt a typically postmodern strategy. This is an area in which restorative justice has adopted not only the techniques of postmodernism but also its terminology.

37 See Appignanesi & Garratt (1995: 80): 'Texts are never simply unitary but include resources that run counter to their assertions and/or their authors' intentions. Meaning includes identity (what it is) and difference (what it isn't) and is therefore continuously being 'deferred'. Derrida invented a word for this process, combining difference and deferral – *différance*.' See also Stacy (2001: 88): 'Through *différance*, Derrida sets out to explore "otherness", and the ways in which texts leave out or suppress alternative significations.'

38 Heartney op cit 51.

project is devoted to embracing all that is different and to championing the claims of the outsider. It is about giving a voice to the narrative of every outgroup which hitherto has been reduced to 'a sideshow in the grand narrative of world history'<sup>39</sup> by the domination intrinsic in totalization. The postmodern ideal is a world free of the modern bias against the Other, in which there is no longer any ontological difference between insider and outsider, and in which otherness has ceased to be a concept of marginality.

The postmodern credo is one of perfect equality, in terms of which every perspective is accorded absolute validity. There is no room for either hierarchy or domination in the postmodern worldview. If the postmodern ideal comes to pass, we shall find ourselves, to mangle Marx once more, in a very Eden of the innate equality of narratives. Postmodernism is, in this connection, the self-appointed saviour of the Other. If postmodernism is an emancipatory movement, then outsider emancipation is at the top of its agenda. There is nothing more quintessentially postmodern than the endeavour to find and legitimate the outgroup narrative. Therein, for many postmodernists, lies the true meaning of their project.<sup>40</sup>

Postmodern jurisprudence is, unsurprisingly, heavily populated by schools of outsider jurisprudence. The engagement between postmodernism and the law is dominated by the jurisprudence of the traditional outgroups identified above.<sup>41</sup> Such outsider jurists typically present an alternative truth to that installed as modern law. They seek to secure for their constituencies the same substantive legal

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39 Ibid 65.

40 See Harvey (1989: 47) who refers to the seduction of 'the most liberative and therefore the most appealing aspect of postmodern thought – its concern with "otherness"'.

41 See Feldman op cit 158-9.

subjectivity which modernism had reserved for able-bodied white heterosexual men.<sup>42</sup> The jurisprudence of alterity desires to integrate outgroups into the concept of legal subjectivity, and thereby to construct a properly universal and neutral subject. It is, ultimately, about validating otherness by subverting the axiom of sameness which lies at the heart of the modern legal form.

Restorative justice may be understood as the outsider jurisprudence of the criminal justice system. Like postmodernism in general and postmodern jurisprudence in particular, it too is dedicated in a fundamental sense to the cause of the Other in the criminal justice system. The traditional outsider of criminal justice is, of course, the victim. Victimologists preceded restorationists in their advocacy of victims' rights and their overall concern with improving the status of the victim in the criminal justice system. Restorationists have, however, taken a far more radical approach and installed the victim at the epicentre of the restorative process. The victim is no longer someone who must be taken into account by those who manage the disposition of criminal conflicts. He is no longer someone to or for whom justice must be done. In the restorationist programme, the victim is an agent of justice. He is transformed from outsider to insider and becomes an indispensable participant in the restorative process. His otherness, originally a source of powerlessness, is transfigured into a source of power. He becomes a 'stakeholder'. Restorative justice vindicates the narrative of victim in the face of the metanarrative of the criminal justice system.

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42 See Davies *op cit* 70-74.

The community is the other Other of the criminal justice system. It may be true that courts are usually enjoined to take into account the interests of the community when sanctioning a criminal offender. However, the determination of the interests of the community is seldom, if ever, made by the community itself.<sup>43</sup> The community has, in this sense, much the same outsider status as the victim in the criminal justice system. Restorative justice aims to do for the community essentially what it hopes to do for the victim, that is, to bestow upon it the capacities of an agent of justice.

The traditional insiders of the criminal justice system are the state, the legal professionals and the offender. Restorative justice wants no truck with the first two.<sup>44</sup> Of course, the offender remains crucial. However, he is now, along with the victim and the community, a member of a triumvirate of equals, through whom justice must be done. Restorative justice, in this regard, is about reconciling a trilogy of narratives, none of which is authoritative. It is about finding a restorative sanction in the engagement of each agent with the truth-claims of the others. And it is about ensuring that the traditionally muted are given voice. That is a typically postmodern way of doing justice.<sup>45</sup>

43 It may be made by a magistrate or judge, who may or may not be assisted by lay assessors. Or it may be made by a jury. Restorationists do not consider either lay assessors or jurors to be adequately representative of the community.

44 The ejection of the state and legal professionals does not amount to the creation of new Others. It simply means that they are no longer pertinent to the justice process. Those who have no interest in the process are not outsiders in the sense used here.

45 The postmodern language of alterity has become part and parcel of the advocacy literature of restorative justice. Restorationists routinely call for those 'other' voices which have been silenced by the criminal justice system to be heard. See, for example, Toews & Zehr op cit 262: 'Maintaining the crime experience in the hand of experts contributes to othering and the creation of social distance between offenders, victims and the rest of society. The public is never permitted to encounter offenders and victims as multi-dimensional individuals with personal stories and unique experiences. Instead, offenders as well as victims become stereotypes of the "other". These others are often associated with ethnic groups and social classes different than the majority of society.'

### 6.3.4 Thesis 4: Power

Foucault's position on power has acquired the exalted status of postmodern conventional wisdom.<sup>46</sup> In accordance with its rejection of the grand narrative, postmodernism detaches power from its modern association with the state and the repressive and ideological state apparatuses. The state monopoly of power is denied, and the locus of power is dispersed throughout the social structure, from the apex of political power to the relations between individuals in a myriad of everyday power relations.<sup>47</sup> In contrast to the centralized notion of power comprehended by modernism, postmodernism posits a multiplicity of power relations which penetrates into every nook and cranny of our lives. Power, from this perspective, is primarily a local phenomenon. It becomes what Foucault refers to as a micro-physics of power.<sup>48</sup> Given the perceived decline of the nation-state, it is the power configurations of non-state relations which matter most in the postmodern worldview.

The Foucauldian perspective also implies that the postmodern self is, at bottom, a power construct. We do not precede the micro-physics of power. Instead, we emerge as 'the meeting-point in the flows (or discourses) of power'.<sup>49</sup> We are a creation of the self-same power which operates upon us everyday in a myriad of ways. In postmodern terms, the legal subject is 'intrinsically heteronomous, constituted by power'.<sup>50</sup> The juridical is, in this regard, the core notion of a paradigm in which legal subjectivity is the discursive effect of intersecting power plays.

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46 See Feldman (op cit 169-174) who notes that, in their analysis of power, 'postmodern legal scholars follow Foucault'.

47 See Stacy op cit 69: 'For Foucault, power does not merely emanate clearly from identified political and legal domains, but can be found amorously circulating everywhere in society.'

48 Foucault (1977: 139).

49 Kumar op cit 131.

50 Dews (1987: 161).



Restorationists do not publicly comprehend restorative justice as a site of power relations. To be sure, they are consistent critics of the criminal justice system as a matrix of centralized power. And, if they advocate comprehensive restorative justice, they also advocate the end of state power in all criminal matters. However, they tend to be silent on the question of power within the ambit of the restorative process itself.<sup>51</sup> Of course, such silence cannot conceal completely the fact that restorative justice is as deeply implicated in the connivances of power as the criminal justice which it maligns so routinely.

The restorationist rejection of state-sponsored criminal justice suggests that, as a structure-in-power, restorative justice is sensible to the postmodern belief in the omnipresence of power in the constitution of social relations. To the extent that restorative justice is committed to a decentralized justice system, it is committed also to the parcellization of adjudicatory and punitive power. Hence its advocacy of a restorative process which presumes a localized disposition regime. Criminal justice will no longer be state justice, visited upon offenders from on high. It will be neighbourhood justice, structured by the restorative process which embraces both victim and offender as empowered agents of justice. Each restorative community will become a separate locus of power. There will no longer be a metanarrative of power. It will be dispersed into a series of narratives in restorative justice locales.

Whereas restorative justice comprehends centralized juridical power in relentlessly negative terms, its appreciation of the localized variant of such power is generally positive.<sup>52</sup> At the parochial level, power is considered to be a productive

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51 This is, of course, to be expected. The connotations of power are predominantly negative, and no self-image is eager to admit of such negativities.

52 See Dews op cit 161-162.

phenomenon which constitutes the victim and the community (and which reconstitutes the offender) as agents of the restorative process. It is an unspoken presumption of the restorationist catechism that power relations within the restorative process will be fundamentally symmetrical, which will discourage or stymie efforts by any party to lord it over any other. The restorative process is supposed to be one of equalization, not of domination.<sup>53</sup> It would appear that restorationists need to believe that, in their case at least, the fragmentation of power entails a qualitative transformation in the composition of power, such that, at the neighbourhood level, it becomes an instrument of emancipation.<sup>54</sup> At this level, then, power is a progressive heteronomy in the constitution of the legal subject.

### 6.3.5 Thesis 5: Subjectivity

Postmodernism comprehends the subject as a composite of a multiplicity of equal identities. It rejects the notion of the essential subject, rigorously defined and exactly delineated, which is at the centre of modernism. For the postmodernist, the subject is a social construct. Subjectivity is context bound and historically specific. There is no overarching pre-given subjectivity which delimits our person. We are

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53 Postmodernists have generally not given attention to the structural factors which militate against such equalization. It would appear that their primary goal is to transform the criminal justice system from a centralized to a decentralized one. And whereas they have problematized criminal justice as state justice, they have, naïvely, presumed that the restorative process will render power relations at the local level unproblematic.

54 It must be noted here that local power is potentially as dangerous as central power. Local power also tends to agglomeration in the same way as does central power. Local power is as susceptible of metanarrative pretensions as central power. Indeed, many local powers of disposition tend to come into existence as a version of central power. If such powers are a concession from the state, they are easily comprehended within the grand narrative of state power. In other words, there is nothing inherent in the dispersal of the power of disposition to regional or neighbourhood structures to suggest the dissipation of the tyranny of the grand narrative.

created and re-created as subjects within the social context in which we find ourselves.<sup>55</sup>

Whereas modern subjectivity is centred, postmodernism proceeds from a decentred subjectivity. It is always in formation and is never a nucleus of sovereignty for the self. Feldman identifies two implications of postmodern subject decentredness. Firstly, the subject is not an autonomous site of power which is capable of directing the course of social development.<sup>56</sup> Secondly, the subject does not possess an immutable centre upon which its elements may be elaborated or from which they may be extrapolated.<sup>57</sup> Postmodern subjectivity is fragmented to the core, so to speak. There is, in other words, no postmodern subject who has not been constituted from the asymmetries and incommensurables which make up social existence.<sup>58</sup>

Postmodern jurists transpose this idea of the social construction of subjectivity to their critique of the legal subject. The modern conception of the legal subject is singular and indivisible. Only those characteristics which qualify as juridical are factored into the constitution of the legal subject. Any other sources of subjectivity are summarily discarded. In other words, the law recognizes only the legal subject. In the modern view, all non-legal derivations of legal subjectivity are

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55 See Feldman op cit 174-176, Davies op cit 73-74 and Stacy op cit 11-12.

56 Feldman ibid 174.

57 Ibid 175.

58 See Stacy op cit 12.

considered trivial. Postmodern legal analysts are highly critical of this exclusionary nature of the modern conception of legal subjectivity.<sup>59</sup> Their major aspiration in this regard is to have non-legal subjectivities acknowledged and accepted, alongside legal subjectivity, as indispensable to the construction of a truly just dispensation.

Restorative justice is similarly impatient with the proscriptions and preclusions embedded in a strictly legal subjectivity. Indeed, the restorative process cannot accommodate the modern conception of the legal subject. It is a process which seeks to comprehend both victim and offender as more than mere legal subjects, as real people who lead complicated and unpredictable lives in diverse and contradictory conditions. Criminal justice reduces them to 'mere' legal subjects. Restorative justice proposes a subjectivity which extends to all those other aspects of their lives which, albeit non-juridical, are pertinent to the construction of a properly restorative sanction.<sup>60</sup>

The restorationist rejection of the limitations of legal subjectivity emulates its rejection of a state presence in the restorative process. Ultimately, legal subjectivity is a state-guaranteed status. The absence of the state invariably has a disintegrative effect upon legal subjectivity, thereby allowing for the activation of non-legal sources of subjectivity in the restorative process. The anti-statism of restorative justice is, in

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59 See Beger (2002: 187-188, original emphasis) who describes the modern conception of legal subjectivity in the following terms: 'The legal arena cannot operate without the logic of identity, yet subjects of the law do not exist prior to their negotiation in the legal processes. The power of law lies in representing something as real, as the only possible representation of the real. So, while subjects in court rooms are real people, they can only ever be represented partially in their diversities. The legal subject can only present itself *as subject* in the discursive logic of the juridical. Other possible truths and realities exist, but the reality that can be heard by legal interpretation is hegemonic and dominant. Thus, the power of the law is its acclamation of one reality as the most true reality, the most important reality.'

60 Recall Christie's (1977: 9) argument for neighbourhood courts in which are considered 'every detail regarding what happened – legally relevant or not'.

this connection, crucial to exploding the formal bounds of legal subjectivity. Indeed, restorative justice cannot stay within the prescribed parameters of legal subjectivity without subverting itself and its goals. The legal subject is germane to criminal justice. The restorative process needs to take account of ‘the diversity of the human condition’<sup>61</sup> if it is to be at all distinguishable from the criminal justice process. And the restorative sanction needs to be constructed according to realities which lie outside the ambit of legal subjectivity if it is not to be just another variant of state punishment. Again, restorative justice emerges as a decidedly postmodern way of doing justice.

#### 6.3.6 Thesis 6: Consumerism

Sardar identifies consumerism as ‘the quintessential characteristic of the postmodern era’.<sup>62</sup> In the same vein, Jameson refers to postmodernism as a ‘culture of consumption’<sup>63</sup> which reproduces the ‘logic of consumer capitalism’.<sup>64</sup> There can be little serious discontent about this characterization. If postmodernity can be reduced to any single condition, it has to be the complete triumph of consumerism. The postmodern subject is constituted, literally, by his ‘consumption of mass-produced objects and images’.<sup>65</sup> And the postmodern world is a hyperreality of representations of the universal consumer. It is a world in which:

‘the department store [becomes] the cathedral of postmodern desire and the act of shopping [becomes] the postmodern version of democratic choice’.<sup>66</sup>

Postmodern society is, in a word, consumer society writ large.

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61 Stacy op cit 12.

62 Sardar op cit 59-60.

63 Jameson (1991: 206).

64 Jameson (1988: 29).

65 Heartney op cit 42.

66 Ibid 47.

Consumerism is, of course, more than the drive to accumulate and consume mass-produced goods and images. It is also, and crucially, the triumphant materialization of commodity fetishism. It is the highwater mark of exchange relations in an economy structured by generalized commodity production. The relations between postmodern subjects are constituted as relations between commodities, the accumulation of which becomes, so to speak, a consuming passion. In other words, consumerism entails the fetishization of human relations. Postmodern subjectivity is consumerist to the extent that it is a commodified subjectivity.

Consumerism, then, is commodification unbridled. It is a culture which is distinguished by the commodification of everything, literally.<sup>67</sup> Everything is a commodity and the commodity is everything. The commodity is the elemental form of capitalist property and all commodity exchange relations are thus fundamentally proprietary in nature. In other words, the notion of consumerism is an essentially proprietary notion. The postmodern culture of consumption is the spirit of capitalist property made tangible, if somewhat rudely and gaudily. If rampant consumerism exemplifies postmodernism, then rampant commodification exemplifies postmodernity. And if the postmodern subject is first and foremost a consumer, then the postmodern consumer is first and foremost a proprietor.

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67 The following statement by Marx (1975: 34) is uncannily prescient of this aspect of postmodernism: 'Finally, there came a time when everything that men had considered as inalienable became an object of exchange, of traffic and could be alienated. This is the time when the very things which till then had been communicated, but never exchanged; given, but never sold; acquired, but never bought – virtue, love, conviction, knowledge, conscience, etc. – when everything finally passed into commerce. It is the time of general corruption, of universal venality, or, to speak in terms of political economy, the time when every thing, moral or physical, having become a marketable value, is brought to the market to be assessed at its truest value.'

Postmodernism, then, is deeply complicitous in the reproduction of the property relations of capitalism. However, and in keeping with its quest of diversity and multiplicity, postmodernism is not committed to the conventionally private and unencumbered form of capitalist property. The postmodern conception of property is an expansive and a flexible one. And while it may accept that bourgeois property is primarily private, postmodernism does not accept that it has to be exclusively private. Indeed, it urges that the private fundament be augmented by a social or public dimension, in terms of which private ownership is charged with collective duties and responsibilities. In other words, postmodernism seeks to dethrone the individualist and absolutist notion of proprietorship which typifies modernism. Such proprietorship is disapproved as totalizing and tyrannical. The regime of private bourgeois property must therefore be detotalized, by confronting it with the sensibilities of public service and community obligation. The postmodern conception is thus one which comprehends a decentred proprietary regime structured by an engagement between private rights and public claims.<sup>68</sup>

Restorative justice may be considered a version of postmodern consumerism. This proposition, especially its conjoining of restorative doctrine with an unsavoury culture of consumption, will likely offend the bulk of restorationists. However, it is a proposition which is properly defensible. To be sure, restorative justice by no means displays or condones the excesses of wanton consumerism. But it is as deeply inculcated as such consumerism in the process of accelerated and generalized commodification which characterizes the postmodern epoch. In other words, the difference between restorative justice and postmodern consumerism is a quantitative one, based on the extent to which the one is restrained and the other not. It is

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68 See Feldman op cit 167.

submitted that they are qualitatively akin in that they both embrace a foundational proprietary axiom. Both espouse property as their organizing principle.

The proprietary nature of consumerism is obvious and incontrovertible. It has been argued in detail in previous chapters, especially Chapter Five, that restorative justice is a fundamentally proprietary concept. In this connection it will be recalled that Christie, who is the acknowledged doyen of restorative justice theory, expressly conceives of crimes as forms of property. In terms of the Christie thesis, every crime is the property of the offender and the victim, and every criminal conflict is resolved, literally, in consumption by its owners. It will be recalled further that the idea of dominion developed by Braithwaite & Pettit may also be comprehended as a form of property. For them, too, restorative justice, as a response to the crisis of criminality, proceeds from the premise that human relations are proprietary, at base. It is true that restorative justice may share none of the extravagances usually associated with consumerism.<sup>69</sup> But insofar as consumerism recasts human relations in proprietary terms, restorative justice is resolutely consumerist.

The conception of property adhered to by restorative justice cements its affinity with postmodernism. It has been shown in Chapter Four above that neither Christie nor Braithwaite & Pettit comprehend capitalist property as necessarily private. Their theories of restorative justice are constructed around a form of property that is best classified as common. This is a form of capitalist property which departs from the traditionally private form, in the extent that non-owners enjoy access to it and possess

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69 The extravagances of restorative justice lie elsewhere, in the promises embedded in what Daly (2002: 70) refers to as 'the exceptional or "nirvana" story of repair and goodwill'.



certain rights in it. For Christie, it is the criminal conflict itself which is common property. For Braithwaite & Pettit it is dominion.<sup>70</sup> The restorationist position on property thus replicates the postmodern position in its willingness to decentre bourgeois property and theorize it in terms other than the traditionally private. Both positions foreground a form of property which usually exists only in the penumbra of the dominant form. And while such an approach may leave the dominant form intact, it does undermine the dominance hitherto enjoyed by modern attempts to resolve the crisis of criminality.<sup>71</sup>

It is submitted that, *en bloc*, the six theses discussed above support the conclusion that restorative justice is the paradigmatic form of postmodern criminal justice. The extent to which restorative justice replicates the postulates of postmodernism in these six spheres is far-reaching enough to sustain such a conclusion. Certainly, from the postmodern perspective, there is nothing objectionable about designating restorative justice the exemplar of postmodern criminal justice. Thus, for example, Edgeworth identifies the growth of restorative justice strategies as a manifestation, in the criminal sphere, of the advance of legal postmodernization.<sup>72</sup> He refers to restorative justice as a new paradigm of justice which, in true postmodern fashion, advocates both the elimination (or, at least, severe reduction) of state involvement in criminal justice, as well as the ample expansion of the sources of legal subjectivity to include non-legal considerations.<sup>73</sup> All in all, postmodernism is not at all reluctant to acknowledge parenthood of restorative justice.

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70 It would appear that restorationists have opted for an atypical conception of capitalist property because they realize that the crisis of criminality can never be resolved within the parameters of a private capitalist proprietary regime.

71 Indeed, the modern conception must take a not inconsiderable share of the responsibility for precipitating the crisis.

72 See Edgeworth *op cit* 155.

73 *Ibid* 170.

It appears, however, that the feeling is not yet mutual. The advocates of restorative justice have hitherto not engaged the notion that they have fabricated a postmodern phenomenon. Certainly, it is most unlikely that theorists such as Christie and Braithwaite & Pettit made any conscious effort to incorporate postmodern premises into their work, even less to produce a postmodern theory of restorative justice. Indeed, Christie's view of crime as property falls more easily into the ambit of Reich's new property of welfarist modernism (*à la* MacPherson)<sup>74</sup> than it does into postmodernism. This may well mean that restorative justice does not enjoy an impeccably postmodern genealogy. However, it does not diminish the discernibly postmodern character of restorative justice. All that it means is that postmodernism has pillaged the domain of modernism and arrogated to itself, in whole or in part, the expansive concept of property which had emerged in the welfare era. At this juncture, postmodernism may not inform the self-image of restorative justice. But there exists an undeniable and objective intersection from which it is properly reasonable to infer that restorative justice is indeed a species of postmodernism.

#### 6.4 Critique of Restorative Justice as Postmodern Justice

It remains to present a critical appreciation of restorative justice as the representative postmodern response to the contemporary crisis of criminality. The critique which follows will, of course, adhere to the Marxist method which informs this dissertation.<sup>75</sup> It needs to be noted, however, that it is not intended to be a

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74 Ibid 150.

75 Postmodernism has a strong anti-Marxist strand, derived from its classification of Marxism as a metanarrative. Montag (1988: 96) responds to this charge in the following terms: 'Theory exists everywhere in a practical state. Marxism, whatever the conceptualizations it has offered of its own practice, has never functioned as a metanarrative. In its practical existence, it speaks of nothing other than a struggle for which there is no outside and which is never structured according to the order of a logic or a law. Political practice acts within a conjuncture in order to act upon it, caught or "entangled" (Lenin) in the very relationship of forces it attempts to modify.'

Marxist dissection of the six theses explicated above. That would be an exercise in theoretical idleness and would shed no analytical light upon either restorative justice or postmodernism, let alone upon their interrelation. Instead, the general idea is to deploy the resources of historical and dialectical materialism in an effort to illuminate the relationship between restorative justice and the postmodern analytic from a Marxist perspective. And the specific aim is to show that the designation of restorative justice as postmodern does not detract in any way from the applicability of Pashukanis's general theory of law to its analysis.

Rosenau has remarked that 'detached efforts to evaluate post-modern modes of thought are quintessentially "no win" ventures'.<sup>76</sup> Given the fundamental open-endedness, indeterminacy and contradictoriness of postmodernism,<sup>77</sup> its proponents will always be able to point to deficiencies in attempts to assess it. The problem is, of course, exacerbated in respect of partisan efforts at evaluation, such as that undertaken here. Postmodernists and their sympathizers will no doubt decry a Marxist assessment as one-sided or incomplete or simplistic. Such a charge is inevitable, more or less, since any attempt to 'represent the unrepresentable' is, of course, inherently impugnable.<sup>78</sup> The 'unrepresentability' of postmodernism thus problematizes its critique. Abbinnett has pushed the point to its logical conclusion by denying the possibility of making a fair evaluation of postmodernism from within the parameters of either Marxism or liberal democracy. For him, any valid assessment must 'read postmodernist theory in its own terms'.<sup>79</sup> That is, the critique of postmodernism ought to be made through the lens of postmodernism.

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76 Rosenau (op cit: ix).

77 See Hutcheon op cit 3 and Rosenau ibid 3.

78 Rosenau ibid ix.

79 Abbinnett (2003: 11).

Such a position is theoretically untenable, and not only from a Marxist perspective. No school of thought can seriously require its critics to adopt its perspective as their vehicle of critique. Even those critics who accept the notion of postmodernity have no theoretical obligation to accept the tenets of postmodernism.<sup>80</sup> The point is that postmodernism cannot expect its opponents to deprive themselves of critical resources which lie beyond its theoretical ambit. Postmodernism deploys its own theoretical propositions in its assault upon modernism, Marxism and other such 'metanarratives'. There is no good reason why its critics should not do the same. Indeed, there appears to be good reason why they should.<sup>81</sup> The postmodern dedication to diversity and uniqueness discourages, even repudiates, systematic or synthetic critique. Yet, such critique is the only way to make sense of the postmodern penchant for idiosyncrasy. What is more, the 'cut-and-paste character of post-modernism'<sup>82</sup> requires that its critique proceed according to the methodological precepts of modernism.<sup>83</sup> The 'unruly child' of modernism needs a modern disciplinary yardstick.

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80 See May (1996: 212-213), who points out that both Harvey and Jameson accept the existence of postmodernity while rejecting postmodern social theory and maintaining a commitment to Marxist social theory.

81 See Rosenau *op cit*: 18: 'No effort is made [in this work] to adhere to post-modern guidelines for enquiry. On the contrary, it is likely that these will be violated, though not through disrespect or malice. Rather, any violation can be construed as an inevitable consequence of seeking to cut through the intentional stylistic ambiguity, some would say obscurantism, that characterizes post-modern writing and to communicate to an audience broader than the post-modern community itself.'

82 Ibid 14.

83 See Rosenau *ibid* 19-20: 'But here we really have no other option but to transgress by the very act of inquiry. This project necessarily requires a modern emphasis on synthesis and unity, rather than the post-modern preference for preserving difference and complexity. If those outside its inner circle are to achieve an understanding of post-modernism, then comparisons with modern views seem essential; this goal urges us on to generalization and simplification. To consider everything a unique occurrence leaves one unable to go beyond description ... Within a post-modern world truth is absent, and this renders evaluation and judgment relatively meaningless. In the absence of any alternative criteria for evaluation, what option remains except to measure post-modernism with a modern gauge ... And is this really so unfair, given that many post-modernists do much the same thing when they employ a post-modern perspective to judge modern social science?'

#### 6.4.1 Marxism and Postmodernism

The modern criterion of critique which informs this dissertation is Marxism. It is appropriate, therefore, to set down a brief statement of the Marxist critique of postmodernism in general.<sup>84</sup> This critique is advanced and comprehensive. Jameson's categorization of postmodernism as the cultural logic of late capitalism remains, for the most part, impressively unimpeachable.<sup>85</sup> Harvey's analysis of postmodernity as an epoch demarcated by a new regime of flexible accumulation arising out of the general crisis of overaccumulation besetting capitalism is both thorough and entirely convincing.<sup>86</sup> Callinicos's spirited argument for a fundamental continuity between modernism and postmodernism and his frontal assault upon the validity and viability of the postmodern project remain admirably potent and largely unscathed.<sup>87</sup> Eagleton's subtle analysis of the deeply commodified character of postmodernism has stood intact for almost two decades.<sup>88</sup> And Sardar's exposé of postmodernism as a western imperialist 'consumption' of the vitalities and traditions of the non-western Other, albeit not classically Marxist, is damning enough to shake the faith of all except blind devotees.<sup>89</sup>

The general features the Marxist critique of the perceived newness of the postmodern epoch in both its structural and superstructural aspects have been established. The focus of such a critique has to be less upon what is new about the

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84 Although postmodernism in general is not my focus, such a statement is a desirable prolegomenon to my attempt to develop a Marxist critique of restorative justice as postmodern justice.

85 See Jameson (1991: 1-54).

86 See Harvey op cit 121-197. See also Lash (op cit: 37-38) and Urry (1988: 30-33) who link the emergence of a new regime of accumulation to the shift from organized to disorganized capitalism.

87 See Callinicos (1989: 121-171).

88 See Eagleton (1986: 131-148).

89 See Sardar op cit 44-84 & 272-291.

‘new times’ than upon its elements of continuity with ‘modern times’. This focus is not an attempt to avoid grappling with the newness of postmodernism. Rather, it is a choice which is intended to throw light upon the political economy of this newness. The analysis of postmodernism needs to be anchored in the historical and material context of its evolution. In this regard, the paramount feature of postmodernism is that it is a capitalist phenomenon. It is the superstructural expression of the contemporary conjuncture of capitalism. Thus, whereas the identification and demarcation of postmodernism must of necessity proceed from its newness, the critique of postmodernism must commence with the capitalist constants which underlie its newness.

Although the Marxist critique of postmodernism is by no means unified,<sup>90</sup> a number of commonalities stand out above any internecine disputes. For the purposes of this chapter, those commonalities matter most which have the strongest bearing upon the relationship between postmodernism and restorative justice. In this regard, there appears to be general agreement within Marxism upon at least the following trio of characteristics of postmodernism and postmodernity:

- Postmodernism is a thoroughly bourgeois phenomenon. It is a superstructural expression of the contemporary epoch of capitalism, which is one marked by explosive material contradictions. Postmodernism is thus the intellectual product of the structural economic crisis which is ravaging the heartland of the capitalist mode of production. It is simultaneously the intellectual source of the bourgeois endeavour to stave off the threat of total collapse.<sup>91</sup> Therefore, and despite its apparently historic

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90 See, for example, the attack upon Jameson (1988) by Davis (op cit) and Montag (op cit).

91 Following Harvey (op cit), the crisis is best comprehended as one of overaccumulation, requiring a flexible regime of accumulation to counteract the tendency of the rate of profit to fall.

newness, there is no reason to analyse postmodernism as anything other than a superstructural effectivity of capitalism.

- There is no fundamental difference between modernity and postmodernity insofar as they are comprehended as eras of the capitalist mode of production. Postmodernism may represent an intellectual sea-change from modernism. But postmodernity is not as fundamentally different from modernity as to qualify as some sort of postcapitalist epoch. Postmodernity is, quite simply, the contemporary conjuncture of capitalism. And the essentials of the capitalist constitution remain unreconstructed. That is, capitalist social relations of production are still defined by the struggle between bourgeoisie and proletariat; labour-power remains the only true source of surplus value; the anarchy which marks all departments of capitalist production continues unabated; the bourgeois worldview remains fundamentally juridical; and the capitalist property regime continues to be defined in individualist terms. This catalogue of constants is by no means complete. But it is comprehensive enough to convince that there is no basis upon which to comprehend postmodernity as anything other than an epoch - the current one - in the life and death of the capitalist mode of production. And while postmodernity is arguably the last epoch of the capitalist mode it is by no means the first of a postcapitalist mode.
- As an economy of generalized commodity production, capitalism has an inherent tendency to commodify social relations. The history of the capitalist mode of production is, in this connection, the history of the process of commodification. Postmodernism has elevated commodification to heights unheard of in the evolution of capitalism. 'Postmodernism is the consumption of sheer commodification as a

process.’<sup>92</sup> And postmodernity is the unmitigated triumph of the commodity. It is the stage of capitalism in which ‘social reality is pervasively commodified’.<sup>93</sup> It is the era which is delineated by ‘the systematic commodification of everyday life’.<sup>94</sup> The dictatorship of the bourgeoisie materializes as the dictatorship of the commodity.

#### 6.4.2 Commodification and the Principle of Equivalence

The last of the trio of items canvassed above, that is, the concept of commodification, holds the key to the Marxist interrogation of restorative justice as a postmodern justice. The march of the commodity is not merely about the colonial-type conquest of areas of social existence hitherto unsullied by grubbing acquisitiveness. It is also and, arguably, more importantly about equalization. Commodification in the postmodern world is, firstly, the assertion of the principle of equivalence which governs the market in commodities and, secondly, the extension of this principle into areas of life which traditionally have had no relation to the market.<sup>95</sup> Essentially, the postmodern acceleration of commodification is an exercise in the universalization of the principle of equivalence which defines the capitalist

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92 Jameson op cit x.

93 Eagleton op cit 133.

94 Callinicos op cit 151.

95 The commodity is at the epicentre of life in the capitalist system. The commodity form concentrates in itself all the constitutive elements of capitalism as a mode of production. It stipulates equivalence as the governing principle of capitalist social relations of production. The legal form which accompanies the commodity form is nothing other than the equality postulate given the imprimatur of the capitalist state. The legal subject is the postulate made flesh. He exists first and foremost as a commodity owner. And as such, he has no superiors or subordinates, only equals. In the epoch of competitive capitalism, it was in the market in commodities that the principle of equivalence mattered most. The development of the free market depended upon all-round respect for and acquiescence in the principle. The epoch of late capitalism has seen the steady extension of the principle of equivalence into more and more of the non-economic facets of the social relations of production. In other words, there has been an increasing intrusion of the spirit of the commodity into more and more areas of human relations.



exchange relation. It is the amplification of the principle from its origins in commodity exchange to the exchanges of everyday life.<sup>96</sup> Postmodernity is, in a word, the commodification of everything. It is the high-water mark of the fetishization of the social relations of production. The absolute dominance of the commodity has transformed existence itself into a hyperreality of infinite simulacra.<sup>97</sup>

It is tempting to take the accelerated commodification of the postmodern era as an index of the vitality of capitalism. That would be a mistake. By the time it entered its monopoly stage, capitalism was no longer a developing mode of production, and it has been degenerating ever since. Modernism was a response to this historic decline of capitalism. Postmodernism, too, is an expression of crisis, not of vitality. Thus Davis observes that:

‘the crucial point about contemporary capitalist structures of accumulation [is] that they are symptoms of global crisis, not signs of the triumph of capitalism’s irresistible drive to expand.’<sup>98</sup>

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96 See McVeigh (2002: 279): ‘Much of the work of postmodern theory in United States of America has disputed modern jurisprudence in the field of epistemology. It has been concerned to work towards a jurisprudence that recognises, and respects, equality in difference.’

97 This transformation assumed a phantasmagorical aspect in Baudrillard’s bizarre pre-war pronouncement that the Gulf War would not take place and his even more bizarre post-war declaration that the Gulf War had not taken place. See Norris (1992: 15) who avers that postmodernism has rendered truth obsolete, ‘in so far as we have lost all sense of difference – the ontological or epistemological difference – between truth and the various true-seeming images, analogues and fantasy-substitutes which currently claim the title. So the Gulf War figures as one more example in Baudrillard’s extensive and varied catalogue of postmodern “hyperreality”. It is a conflict waged – for all that we can know – entirely at this level of strategic simulation, a mode of vicarious spectator-involvement that extends all the way from fictive war-games to saturation coverage of the “real-world” event, and which thus leaves us perfectly incapable of distinguishing the one from the other.’

98 Davis op cit 83.

The postmodern intensification of commodification is part and parcel of the attempt to resolve the current capitalist crisis of overaccumulation<sup>99</sup> by restructuring the regime of accumulation along more flexible lines.<sup>100</sup> Flexibility requires a more expansive domain of accumulation opportunities. Hence the intrusion of the commodity form into areas of life not traditionally associated with the ethos of the market. Accelerated commodification is thus a symptom of weakness, not of strength. It is a sign that capitalism can no longer countenance significant spheres of social relations outside the market in commodities. The contemporary imperatives of its reproduction as a mode of production demand that human existence be commodified as far and as fully as possible. Everything must become a potential source of capital accumulation. Flexible accumulation means absolute obeisance to that basic law of the commodity, the principle of equivalence.

This is the context in which postmodernism becomes a celebration of equality. It is equalization untrammelled. Thus, the fabled postmodern incredulity towards metanarratives is really an incredulity towards the inequality inscribed in such metanarratives. The premodern narratives towards which postmodernism is especially partial are comprehended as perfect equals of one another and are understood to display none of the despotic propensities of the metanarrative. There is

99 See Harvey (op cit 180-181) who defines overaccumulation as 'a condition in which idle capital and idle labour supply could exist side by side with no apparent way to bring these idle resources together to accomplish socially useful tasks'. He continues: 'A generalized condition of overaccumulation would be indicated by idle productive capacity, a glut of commodities and an excess of inventories, surplus money capital (perhaps held as hoards), and high unemployment.'

100 According to Harvey (ibid: 147), flexible accumulation 'is marked by a direct confrontation with the rigidities of Fordism. It rests on flexibility with respect to labour processes, labour markets, products and patterns of consumption. It is characterized by the emergence of entirely new sectors of production, new ways of providing financial services, new markets, and, above all, greatly intensified rates of commercial, technological and organizational innovation.'

no grand narrative; there is only an infinite series of equally valid narratives. In other words, the repudiation of the metanarrative is simultaneously an assertion of the principle of equivalence.

Much the same can be said about the process of de-differentiation which Lash has identified as a postmodern marker.<sup>101</sup> De-differentiation collapses the distinctions, erected by modernism, between the spheres of existence. In particular, the social is no longer clearly differentiated from the cultural, while the cultural assumes the characteristics of the economic. Edgeworth sums up the process cogently:

‘There is a fusion of social institutions and elements, previously differentiated, into quite novel combinations: institutions formerly characterized by ideologies and practices at odds with strictly economic criteria, begin to operate in ways analogous to the market.’<sup>102</sup>

Since the market is defined in terms of commodity exchange, the process of de-differentiation becomes a kind of panegyric to the principle of equivalence. De-differentiation means, in the end, that there is no sphere of existence which is beyond the reach of the commodity and its basic laws.

Postmodernism’s devotion to equality is evidenced also in its approach to history. It is an approach which privileges no historical event or epoch over any other. The historical record becomes ‘an endless reserve of equal events’.<sup>103</sup> And history ends because every aspect of the past is as important as every other aspect. Sardar captures the postmodern historical canon perfectly:

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101 See Lash op cit 11-15. See also Murphy (1991: 124): ‘The attitude of enlightenment modernism, as opposed to postmodernism, was to say: one sphere, one value. The attitude of postmodernism is to say: the different spheres and rival conceptions of justice must be accommodated to each other.’

102 Edgeworth op cit 53.

103 Taylor cited in Harvey op cit 85.

‘Postmodernism has a particular take on the end of history: it is truly the end of history as we have known it because it envelops all historical events in meaninglessness. Significance can only be an act of interpretation - postmodernism recognizes only multiple competing interpretations. How can one subject them all to truth or reality tests? The grand school of history sought objective verification, but postmodernism suggests a new possibility - that all interpretations are in their way cogent and valid. The end of history is not just Fukuyama’s simplistic, totalitarian terminus, the consummation of modernist historical understanding. The postmodern end of history is the conversion of all temporal sequence into simultaneity, the coexistence of all possibilities as some grand kaleidoscope with no pattern more persuasive, dominant or significant than any other.’<sup>104</sup>

Postmodernism has no use of historical research which is not constrained by the equality postulate. And it has no interest in historical investigations which rely upon an evolutionary framework. It is prepared to ‘make gestures towards historical legitimacy by extensive and often eclectic quotation of past styles’.<sup>105</sup> But the lessons of history must always be subordinate to the dictates of the principle of equivalence.

Postmodernism, then, is endowed with an unqualified commitment to equality in all things. It is a commitment which is embedded in constitutive notions such as polycentrism, multi-perspectivism, antitotalization and the like, which are all versions of the hegemonic principle of equivalence. In the postmodern world nothing is absolute except absolute relativism. Nothing is certain except that every point of view enjoys the same claim to validity as any other point of view. No discursive formation is prior to any other and no person is more valuable than any other. The

104 Sardar op cit 85-86. See also Murphy op cit 118: ‘For the postmodernist, history remains, but there is no march of reason in history. Measured against the benchmark of the Enlightenment’s world history, that is, History with a capital H, postmodernism is also posthistory.’ Murphy goes on to describe the postmodern approach to history as a ‘pop historicism’ of ‘quotations, eclecticism and pastiche’.

105 Harvey op cit 85.

postmodern subject is constituted in terms of the principle of equivalence. He lives and dies by the law of the commodity.

Postmodernism's immersion in the culture of commodification has to mean that it subscribes to a worldview that is fundamentally juridical.<sup>106</sup> The equality postulate which defines the postmodern moment also structures the juridical moment. The common factor is the commodity. In the evolution of exchange, to commodify is to juridify. This is why, despite its nihilistic excesses and random subversions, postmodernism is unequivocally wedded to the bourgeois, that is, the juridical worldview. Indeed, it is militant in its purveyance of this patently sectional worldview as the generalized worldview of all social classes; and it is radical in its advocacy of the principle of equivalence as the determining principle of all human interactions. This is why the postmodern era has witnessed the exponential intensification of the process of commodification. It is also why the equality postulate now reaches into areas which would have been off limits during the modern era.

#### **6.4.3 Pashukanis, Postmodernism and Restorative Justice**

There is no substantive difference between modern and postmodern legal subjectivity. Both are structured by the self-same principle of equivalence which is at the heart of the commodity economy. Both are brought into existence as a direct consequence of the process of commodity exchange. It is correct that postmodernism

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106 See McVeigh op cit 274: 'The account presented here has emphasised that law has changed the means and objects of its regulation. Regulation through law no longer proceeds according to a principle of limited unity marked by distinctions between public and private spheres, State and civil society and so forth. Instead regulation proceeds according to a juridical saturation of social reality.'

seeks to include non-legal sources in the constitution of the legal subject. But this kind of amplification does not entail any diminution in the commodified character of the legal subject. It implies no more than that postmodern jurisprudence is prepared to consider interpretations of reality which fall without the orthodox limits of the legal. Postmodernism is keen to widen the ambit of the juridical. However, there is no evidence that it is willing to abandon the juridical as the defining element of legal subjectivity. It is one thing to incorporate features of the traditionally non-juridical into the composition of the juridical. It is another thing altogether to replace the juridical with the non-juridical. The radicality of postmodernism does not contemplate the latter.

Restorative justice is the criminal justice of postmodernity. It is the postmodern moment in the evolution of the criminal justice system. Like postmodernism, restorative justice is structured by the core juridical principle of equivalence. The owner of the criminal conflict which is consumed in the restorative process is the Pashukanian analogue of the postmodern consumer. If postmodernism demarcates the general configuration of the superstructure of late capitalism, then restorative justice is postmodernism expressed in legal superstructural terms. As a facet of the legal superstructure, restorative justice is, by definition, more directly associated than postmodernism with the legal subjectivity which underpins the market in commodities. But postmodernism is as deeply implicated in the exchange relation. Indeed, postmodernism is arguably more zealous than restorative justice about the principle of equivalence, to the extent that it presses the principle into areas and prods it along pathways which are quite foreign to the traditional ambit of legal relations.

This adventurous streak in postmodernism derives from its involvement in the pursuit of a flexible regime of accumulation. It may well be one reason why restorationists tend to eschew overt postmodern affiliations. But the objective affinity between postmodernism and restorative justice is incontestable. They have the same material and historical origins in the long-term decline of the capitalist mode of production. And they both take commodification to new heights in their respective fields of influence. Postmodernism commodifies everyday life relentlessly. Restorative justice commodifies the criminal conflicts which have become a relentless fixture of everyday life. Restorative justice is postmodernism writ small.

The commodity is the primordial expression of bourgeois property. The postmodern subject is a man or woman of property whose very existence is a materialization of the organizing principle of the commodity economy. The process of commodification is thus essentially about the extension of bourgeois property relations into new areas of social life. Postmodernism is the medium of commodification in contemporary capitalism. It is, in this connection, a profoundly proprietary phenomenon. Despite its avowal of a decentred proprietary regime,<sup>107</sup> postmodernism is complicit in the defence of property as a bourgeois category. Whereas postmodernism may wish to infiltrate alterity into the composition of bourgeois property, it accords its existence as a category the status of an irrebuttable presumption. In other words, it leaves intact the metanarrative of property. The postmodern subversion of all things modern stops short of bourgeois property relations. The postmodern project to destabilize and decentre the elements of modernism has had no significant impact upon the sanctity of property. In the midst

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107 See Thesis 6 above.

of the maelstrom of postmodern destabilization, property survives unscathed as the most stable of capitalist categories.<sup>108</sup> What is more, it has suffused postmodernism with its own ethos.

It is this proprietary ethos which is at the heart of the relationship between postmodernism and restorative justice. Postmodernity constitutes the historical and material milieu of restorative justice. It is a milieu which validates the analysis of restorative justice based upon Pashukanis's general theory of law, as developed in Chapter Five above. In other words, the postmodern character of restorative justice does not vitiate the potency of the Pashukanian critique. If anything, the postmodern connection confirms the appropriateness of the methodology contained in the general theory. For it is the commodified character of postmodernism which structures the proprietary character of restorative justice. And the postmodern celebration of the equality postulate makes patent the correlation between the legal and commodity forms which Pashukanis makes the fulcrum of his general theory.

There is, in other words, nothing in the argument from postmodernism which contradicts the Marxist analysis of restorative justice made possible by Pashukanis's general theory of law. This is because postmodernism understands the world in juridical terms, as does restorative justice. It embraces the principle of equivalence as the organizing axis of social relations, as does restorative justice. And it comprehends the legal form in relation to the commodity form, as does restorative justice. Indeed, the postmodern character of restorative justice does more to

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<sup>108</sup> The postmodern project to destabilize modern private property is destined to fail because it remains wedded to a property regime which is individualist to the core. In the capitalist world, property is special. It is the institution which founds the reproduction of the social relations of production. It is the institution which structures the bourgeois worldview. It cannot be decentred. It can only be discarded. It cannot be detotalized. It can only be destroyed.



legitimate than to undermine the cogency of Pashukanis's general theory. It has been shown in the previous chapter that the general theory is the repository of the resources required for the Marxist critique of restorative justice. It is submitted here that the general theory also contains all the necessary elements of the Marxist analysis of postmodern jurisprudence. And if, as has been argued throughout this chapter, restorative justice is the criminal justice of the postmodern era, then the Pashukanian analysis of it remains not only valid but also unassailable.

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## **CONCLUSION**

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## Conclusion

There is, by all accounts, something near miraculous about the successful restorative encounter. Epiphanies are had. Love and compassion abound. Lives are touched. And the participants glimpse the possibility of an exalted form of human interaction from which the notion of punishment has been expunged. The experience is euphoric, even religious. Restorative justice pledges to take us beyond the punitive society. In its stead, we are invited to share in the prospect of the good society, governed by mutual respect and acceptance of the inalienable value of every human being. The Armageddon-to-Arcadia claims and promises of restorative justice are momentous. And they are utterly seductive. In an epoch defined by a world-wide crisis of criminality, restorative justice constitutes an extremely beguiling credo for any person seeking a solution to the crisis outside the paradigm of traditional criminal justice. It is a credo which is simultaneously impertinently radical and well-nigh irresistible. Hence its large and ever-expanding ranks.<sup>1</sup>

The sheer audacity of its project demands that restorative justice be the object of deliberate critical scrutiny. Despite its many New Age extravagances, restorative justice is not a fad. It has established a weighty presence in the criminological world and it has done so in a very short time. It needs to be taken seriously, that is, its essential arguments and assertions need to be submitted to resolute criticism. This dissertation was conceived as a Marxist contribution to restorative justice criticism. It was undertaken in an endeavour to engage restorative justice in its constitutional fundamentals and to comprehend it as a legal form engendered by the political economy of late capitalism. The singular aim was to probe the material anatomy of restorative justice from a Marxist perspective. This aim could be accomplished only

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1 See Acorn (2004: 1-6) for a discussion of the promises and attractions of restorative justice.

by a combination of scepticism towards the hyperbolic pretensions of restorative justice and a commitment to uncovering the presuppositions which demarcate it as a criminological doctrine. In other words, the goal of the dissertation was to deploy the Marxist method of analysis to make manifest the 'secret life' of restorative justice, which life is for the most part hidden from view by its public physiognomy.

The systematic pursuit of this goal yielded a number of instructive critical insights into the constitution of restorative justice. Firstly, it demonstrated that the restorationist assertion of a historical pedigree that goes all the way back to the dispute-handling processes of primitive or prehistoric society is not well grounded.<sup>2</sup> Historical materialist analysis showed that the idea of composition, upon which the restorationist position turns, is organically linked to the development of the commodity economy and hence of class society. This means that the precedents of restorative justice are not to be found in the prehistoric societies of the savage and barbarian epochs.<sup>3</sup> Instead, its origins lie in historical or civilized society in which the commodity form is definitive and in which class is determinative.

Secondly, using the traditional Marxist technique of class analysis, it was established that restorative justice is deeply complicit in the reproduction of the class relations of capitalism. Epistemologically, restorative justice is class-blind. That is, it does not comprehend our society as a class society rent by class conflict; it does not

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2 This is recognized even by a proponent such as Daly (2002: 61-64), who classifies this claim as one of the myths of restorative justice.

3 Primitive society was the aboriginal form of human society. It was classless, acephalous, lawless and had a natural economy. Class, commodity, law and state made their appearance on the historical stage only during the epoch of the break-up of barbarian society and the rise of civilization.

acknowledge the class basis of the crisis of criminality; and it does not admit of a class dimension in restorative encounters or conferences.<sup>4</sup> Restorative justice considers class only insofar as it presumes the naturalness of the class structure of capitalist society. This presumption inculcates restorative justice in the perpetuation of that structure. A crucial aspect of that which is restored by way of the restorative encounter and sanction is the balance of class forces which has been disrupted by the crime. Restorative justice is as much about normalizing class relations as it is about repairing criminal harm. Objectively, then, the restorationist project features as an aspect of the ideological project of the bourgeoisie to secure its class interests as general social interests.

The third proposition emerging from the Marxist critique pertains to the nature of restorative justice as legal form. The essential argument here, derived from Pashukanis's general theory of law, is that restorative justice is a juridical expression of the commodity form. The commodity is the elemental unit of capitalist political economy. It is the exemplification of capitalist property. The theory of restorative justice is delineated by the proprietary postulate. Behind the talk of compassion, forgiveness, love, mercy, healing and the like is secreted the fundamental idea of the legal subject as a commodity owner, and of the criminal episode as a form of property. Restorative morality, in all its elevated postures, is rooted in the notion of property. As a proprietary concept, restorative justice champions the commodification of penalty. The process of commodification is about subjecting new spheres of social existence to the thrall of the law of value, as embodied in the principle of equivalence. Pashukanis showed that this principle, which began as the defining principle of the commodity form, is entrenched also as the defining principle

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4     References to class and class struggle in the advocacy literature tend to be contingent and peripheral. Despite its inescapable facticity in all but prehistoric societies, social class does not feature as an element of the core terrain of restorative justice.

of the legal form. Restorative justice, as legal form, pivots on the principle of equivalence. The theory of restorative justice commodifies the criminal episode, posits victims and offenders as a universe of commodity owners, and intrudes the ethos of the commodity into the heart of criminal justice.

Marxism thus teaches us that restorative justice is thoroughly suffused with the precepts of popular capitalist culture. It reproduces in juridical terms the law of value which demarcates the commodity form, to reconstruct all of us as perfectly equal and propertied individuals. It endows each of us with a proprietary interest, as 'stakeholders', in the crisis of criminality. Crime is a form of capitalist property owned in concert by the offender and the victim. The restorative encounter is a negotiation between proprietors to resolve the conflict engendered by the crime. And the restorative sanction is a contract designed for this purpose. The theory of restorative justice thus makes patent the correspondence between the commodity form and the legal form. Both are capitalist forms. That is, in their mature aspect, both are historically specific to the capitalist mode of production. The commodity form concentrates in itself all the laws of capitalist production and exchange. The legal form is the materialization of the commodity form. It is the superstructural conduit of the process of commodification. And whereas the process of commodification is a feature of all eras of capitalism, it has intensified prodigiously in the late capitalist era. No contemporary development in legal relations exemplifies the 'commodification of everything' more dramatically than restorative justice. This 'new way of doing justice' is, in fact, an archetypal capitalist way of doing justice, entirely circumscribed within the ideological project of the bourgeoisie.

Fourthly, the Marxist analytic comprehends restorative justice as a product (and hence embodiment) of the structural crisis of overaccumulation which characterizes contemporary capitalism. More specifically, it is a postmodern expression of that

crisis. Postmodernism is the superstructural semblance of the crisis of late capitalism. It entails a radical rejection of the modern metanarrative of capitalist culture and is the self-proclaimed advocate of narrative, relativism and antitotalization. However, despite its radical conceit, postmodernism is completely obeisant to the exigencies of the law of value. Indeed, in its quest of a flexible regime of accumulation to resolve the crisis of capitalism, postmodernism has intensified the process of commodification exponentially in world-historical terms. It has carried the flag of capitalist property triumphantly into almost every virgin terrain. Today we live in the kingdom of the commodity. Postmodernism has catapulted the principle of equivalence to absolute power. It now governs aspects of life which were previously considered to be immune to the cupidity of consumerism. Postmodernism has rendered the commodity both ubiquitous and omnipotent. If, as this dissertation contends, commodification entails juridification, then postmodernism adheres to a decidedly juridical view of the world. That is, it subscribes to the bourgeois worldview, in which the proprietary postulate is sovereign.

Restorative justice is the postmodern way of doing justice. It is the dictatorship of the commodity juridified. The restorationist project is subsumed perfectly within the postmodern project. Nothing in the latter detracts from the Marxist critique of the former. If anything, the postmodern connection validates this critique, in that it unveils the material conditions of the genesis and evolution of restorative justice. Postmodernism was spawned by the crisis of overaccumulation of late capitalism, restorative justice by the concomitant crisis of criminality. Both are infused with the spirit of the commodity. The Marxist analysis of postmodernism confirms completely the analysis of restorative justice made in terms of Pashukanis's general theory of law.

Such, then, are the core components of the Marxist critique of restorative justice undertaken in this dissertation. This critique has shown that there exists a goodly gap between the self-image of restorative justice and its material constitution. As with most phenomena, the form assumed by restorative justice conceals its content. The Marxist method facilitated the excavation of this content. It made available for critical examination the ontological postulates of restorative justice. It laid bare the articulation of the restorative justice with the commodity form. And it established restorative justice as a postmodern trope of our late capitalist world. All in all, the Marxist method has opened a portal to the 'deep structure' of restorative justice.

The critique of restorative justice has necessarily been mostly negative, exposing the disjuncture between its form and content, and establishing its concordance with the ideological programme of the bourgeoisie. There is, however, an important sense in which restorative justice contains a positive prospectus for the crisis of criminality and may be viewed as a progressive development, also from the Marxist perspective. This aspect is elaborated below.

The outstanding feature of restorative justice is its campaign to privatize the criminal episode. There is no more prominent attribute of the comprehensive version of restorative justice with which this dissertation is primarily concerned. And the notion of privatized crime is easily the most radical notion to have been formulated as a solution to the contemporary crisis of criminality. Criminal justice is state justice *par excellence*. Restorative justice is the *parvenu* of privatized justice. But unlike the campaigns for informal justice which preceded it, restorative justice aspires to dismantle state *imperium* over the criminal justice system and to reinvent it as a privatized system which responds to crime according to the wishes of the



affected parties. In other words, restorative justice elevates privatized justice to the systemic level. This is its hallmark. Other concerns such as the welfare of the victim, the reconstruction of the offender and the peace of the community are all accessory to the privatization precept.

The idea of privatization is, of course, emblematic of the accelerated commodification of the late capitalist epoch. In this regard, restorative justice is entrenched in the designs of the ruling class to secure the reproduction of its mode of production. But the proposal to unseat the state as criminal justice potentate is impudently subversive of the bourgeois maxim that criminal justice is public justice. Besides its impact upon the victim, a crime is also an assault upon the principle of equivalence which is the insignia of capitalist relations of production. By his crime, the offender declares a refusal to live by the principle. He repudiates it. This is a repudiation which goes to the heart of the legal form itself. Capitalism cannot leave the defence of the principle of equivalence and hence of the legal form in private hands. That is the responsibility of the state. In the final analysis, violence is the only guarantor of the principle of equivalence. And in capitalist society, the state is the only institution which possesses the capacity to compel acquiescence from the criminal subversives. Thus, although it may tolerate (or even encourage) privatized spheres, capitalism requires its criminal justice to be public in character.

In this context, the restorationist assault upon the statist character of criminal justice is, therefore, a properly radical initiative. It portends a social arrangement which is acephalous and hence not governed by the juridical worldview. Such an arrangement cannot be constructed within the parameters of the capitalist mode of production. In this regard, restorative justice presages a post-capitalist world, that is, a world in which the law of value has lost its purchase and from which the notion of the juridical has been expunged.

Thus, and despite its thorough imbrication in the capitalist order of things, restorative justice, objectively albeit unwittingly, does challenge capitalist hegemony by its agitation for a privatized criminal justice. Certainly, the anti-statist posture of restorative justice puts it on a collision course with the statist imperative of capitalist criminal justice. A vision of criminal justice which centres upon the parties directly involved in and affected by the criminal episode interacting face-to-face to resolve the conflict according to restorative mores is seditious. The restorative belief that justice should be based upon right-relation, that is, 'a lived relationship of mutual equality and respect',<sup>5</sup> is militantly different from the conventional postulates of criminal justice. The idea that a crime should not attract punishment is undeniably subversive of a criminal justice system for which the penal response is an operational axiom. Whereas criminal justice posits justice-as-adjudication, restorative justice propounds justice-as-repair.<sup>6</sup> These designations express cogently the radical dichotomy between the two conceptions of justice. They are negations of each other. Justice-as-adjudication is paradigmatic for capitalist social relations of production. Justice-as-repair can become paradigmatic only in post-capitalist social conditions.

There is a widespread belief in restorationist circles that the restorative encounter can somehow engender human relations which transcend the limitations of the legal form. From the Marxist perspective, that is wishful thinking. The success of the restorationist project is contingent upon the existence of determinate material conditions favourable to its growth. Absent these conditions, failure is more or less inevitable. Of course, the restorative encounter may indeed produce in the participants a transformative optimism about the future. However, transformative optimism is not the same as material transformation. No amount of intellectual or

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5 Acorn op cit 11.

6 This distinction is taken from Acorn ibid 11 & 158.

emotional commitment to justice-as-repair by the parties to the restorative encounter can overcome the material barriers to its achievement presented by the social relations of production of capitalism. It may be readily owned that, as a superstructural effectivity, restorative justice does have an impact upon the material circumstances in which it exists. But such impact can never be transformative, in the sense that it dismantles the capitalist mode of production. That requires a social revolution which would replace the dictatorship of the bourgeoisie with the dictatorship of the proletariat.

Restorative justice is patently not an agent of proletarian revolution. Yet, it does possess a revolutionary impulse in that its aspirations adumbrate a social organization which is utterly divergent from the alienated structure of late capitalism. Justice-as-repair is attainable only in material conditions which humanize social relations, that is, conditions in which human relations are unmediated by the law of value. The restorationist project must, willy-nilly, encompass the contemplation of a society free of commodity fetishism and, hence, of the commodity form itself. And, as Pashukanis teaches, a society which abolishes the commodity form has no use of the legal form. It is in this connection that restorative justice may be legitimately designated revolutionary.

However, restorationists are undiscerning of the revolutionary dimension of their project. They are enthusiastic in their devotion to the ideals of justice-as-repair. They are eager to promote the restorative encounter as a site of the construction of right-relation. They envisage a new kind of human being, activated by the loftier ethical sensibilities. But they appear unable to comprehend the fact that, objectively, their project calls into question the very structure of our society. They seek to reconstruct human relations according to criteria which are both foreign to capitalist

culture and opposed to the bourgeois power matrix. Yet they seem unable to draw the logical conclusion that their success has to mean the demise of the capitalist system. Restorationists aspire to replace the criminal justice system without replacing the capitalist system. They fully expect a historically decrepit mode of production to beget a higher form of justice. They forget Marx's admonition that justice can never transcend the material conditions of its gestation. And they appear unable to perceive that the material constitution of capitalism stands as an impermeable barrier to the success of their project. There is here a debilitating naïveté in restorationist ranks. They cannot or will not see that the attainment of the ideals of restorative justice is not possible within the parameters of the capitalist mode of production. They cannot or will not understand that their anti-statism can prevail only in conditions where the state has been destroyed or is, in the least, withering away.

Restorative justice is thus in the thrall of an impossible contradiction. On the one hand, it is a juridical expression of the social relations of production of the late capitalist epoch. In other words, it is deeply implicated in the political economy of capitalism. Its fundamental proprietary character locates it squarely within the ambit of the bourgeois legal form. On the other hand, it proposes to solve the crisis of criminality according to a catechism which may be described as post-capitalist. It pursues an anti-statist notion of justice-as-repair which is the diametrical opposite of the statist idea of justice-as-adjudication. It embraces the principle of equivalence which delineates the law of value while simultaneously advocating a way of doing justice which is at odds with all that the law of value represents. It is a champion of the process of commodification but seeks a justice dispensation which would explode the commodity form. It is acquiescent in the material conditions which produce

alienated human relations while aspiring to a notion of justice as non-alienated right-relation.

There is something extremely attractive about the notion of justice-as-repair. Which of us does not desire and would not welcome a way of doing justice which resolves the current crisis of criminality by tapping into our capacity for right-relation? Every human being who is perturbed by the degradation of human relations is ineluctably attracted to a doctrine which would elevate these relations above their current quagmire of violence and selfishness. Restorative justice is so seductive to so many people precisely because its ideals accord with our abiding hope that life could and our urgent conviction that it should be better. We need to believe that we have not come to the end of history. We need believe that humanity is not trapped in a state of terminal barbarism and that we can find the road to a properly civilized existence. Restorative justice proclaims itself to be that road, at least insofar as the crisis of criminality is concerned. It promises a new world of justice, in which equality and mutual respect are the primary standards, and from which the statist trope of punishment has been eliminated. There is an almost irresistible allure about such promises. The ideal of justice-as-repair is completely captivating.

This dissertation is an act of resistance against the magniloquence of the restorationist project. It has attempted to demonstrate that the promises of restorative justice are false for the most part, because they are for the most part unattainable in the conditions of late capitalist society. Restorative justice pledges what it cannot provide. For, the entire restorationist project turns on the privatization of criminal justice. The success of restorative justice as a system of justice is entirely dependent upon crime no longer being deemed a public matter administered by the state. In a word, restorative justice requires the expulsion of the state from matters criminal.

But that is a preposterous requirement within the ambit of capitalism. Justice-as-repair is an ideal which can be implemented only if the ruling class is willing to accede to the privatization of criminal justice or if the state is destroyed as an institution of class rule. It is not within the capacity of the capitalist class to contemplate the destruction of its criminal justice system. The bourgeoisie cannot and will not consent to the dethronement of its state as authoritative dispenser of criminal justice. Privatization may well be the way of the postmodern capitalist world, but it is a way which has had to take a detour around the criminal justice system. The statist nature of this system always has been and remains a capitalist injunction. Capitalism, in other words, is wedded to justice-as-adjudication. The promise of restorative justice can be achieved, therefore, only in an acephalous society. Such a society should have to be, at minimum, a post-capitalist society in which the state as an instrument of class rule is in decay.

In the postmodern world of late capitalism, restorative justice has the enticing unreachability of a mirage. Its promise is always in sight but forever unattainable. It will take a radical transformation in the material constitution of society to realize the restorationist project in its entirety. The restorative revolution to install justice-as-repair requires a social revolution to demolish justice-as-adjudication. However, such a social revolution will also revolutionize restorative justice itself, in the sense that it will undergo fundamental re-definition. Currently, restorative justice is a proprietary concept, subsumed under the commodity form and enmeshed in the ideological project of bourgeois hegemony. It is a legal form embroiled in the postmodern iconoclasm of the late capitalist epoch. The social revolution which subverts the commodity form presages the transcendence of the legal form. Thus, the social revolution which dismantles capitalism will also necessarily detach restorative

justice from its capitalist associations. It will release the revolutionary potential of restorative justice and foreground its humanizing mission. It will actualize the restorationist ideal of exalting human relations. The salvation of the restorationist project lies in the social revolution.

For as long, then, as the social revolution is postponed, restorative justice will be burdened by its existential contradiction of being concurrently reactionary and revolutionary. For as long as our society is capitalist, restorative justice will have to accommodate itself to the requirements of justice-as-adjudication. For as long as the commodity form persists, restorative justice will be its juridical analogue. This means that criminal justice as we know it will continue to be paradigmatic, and that restorative justice will have to make do with an interstitial existence. It means that criminal justice will remain state justice, and that the idea of privatized justice-as-repair will have to accept a position of subservience to that of public justice-as-adjudication. Essentially, it means that restorative justice will have to play the proverbial second fiddle to criminal justice.

The potentialities of restorative justice are awesome, but so are the impediments to its success. Whatever progress restorative justice may enjoy in our society will thus be in its partial aspect.<sup>7</sup> Criminal justice and restorative justice are reconcilable only insofar as the latter acquiesces in the superiority of the former. The capitalist system can tolerate and will accommodate restorative justice only in its partial version. That is, the restorationist project will have to accept that its

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7 The discussion by Jantzi (2004) of the role of the state in restorative justice is indicative of a restorationist acceptance of this proposition. See also Boyes-Watson (2004: 215-216) who, while acknowledging 'the fundamental incompatibility between the state system of doing justice and the principles of restorative justice', nevertheless submits that 'our greatest hope for achieving restorative justice in modern democratic societies lies in growing state involvement in restorative justice'.

development will occur under the auspices of the criminal justice system and that its operations will be subject to the oversight of the capitalist state. Such is the only possible existence for restorative justice in the late capitalist world. Certainly, and notwithstanding its obeisance to the ethos of bourgeois property, there is no room whatsoever for comprehensive restorative justice within the ambit of bourgeois society.

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